88-1872

No. _____

In the

Supreme Court of the United States

OCTOBER TERM, 1988

CYNTHIA RUTAN, et al.,

Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is it constitutional to deny a public employee a promotion due to his or her political beliefs or his or her political affiliation?

2. Is it constitutional to deny a public employee a transfer due to his or her political beliefs or his or her political affiliation?

3. Is it constitutional to deny a qualified applicant an opportunity for public employment due to his political beliefs or his political affiliation?

4. Is it constitutional to condition promotion or transfer of public employees upon political support of, or financial contribution to, a favored political party or candidate?

5. Is it constitutional to condition obtaining public employment itself upon political support of, or financial contribution to a favored political party or candidate?

LIST OF PARTIES

The parties to the proceedings before this Court are:

Petitioners:

CYNTHIA RUTAN, FRANKLIN TAYLOR, and JAMES MOORE, individually and as representatives of state employees and potential state employees denied benefits and persons denied employment.[1, 2]

Respondents:

THE REPUBLICAN PARTY OF ILLINOIS and EACH COUNTY OF ILLINOIS by DON W. ADAMS and IRVIN SMITH, individually and as representatives of all Republican State Central Committee and County Central Committee members;

JAMES THOMPSON, individually and as Governor of the State of Illinois;

MARK FRECH, GREG BAISE, WILLIAM FLEISCHLI, RANDY HAWKINS, KEVIN WRIGHT, JAMES REILLY, LYNN QUIGLEY, individually and in their official capacities;

[1] The District Court failed to consider whether the petitioners may properly present this case as a class action. The Seventh Circuit Court of Appeals held this did not deprive that Court of jurisdiction and proceeded to consider the claims presented by petitioners. (A.7).

[2] Plaintiffs Standefer and O'Brien in this case claimed they were not recalled to State employment after lay-off due to their political affiliation. The Seventh Circuit reversed the dismissal of their claims holding the claims were political discharge cases falling under *Elrod v. Burns*, 427 U.S. 347 (1976). Therefore, Plaintiffs Standefer and O'Brien are not seeking review of the Seventh Circuit's ruling as to them.

GREG BAISE, as representative of all Directors, Heads or Chief Executive Officers, since February 1, 1981, of State of Illinois Departments, Boards, and Commissions under the jurisdiction of the Governor; and

LYNN QUIGLEY, as representative of all liaisons since February 1, 1981, between the Governor's Office of Personnel and State of Illinois Departments, Boards and Commissions under the jurisdiction of the Governor.

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The petitioners, CYNTHIA RUTAN, FRANKLIN TAYLOR, and JIM MOORE, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on February 16, 1989.

OPINIONS BELOW

The initial opinion of the Court of Appeals for the Seventh Circuit is reported at 848 F.2d 1396 (7th Cir. 1988). The opinion issued en banc has not yet been published. Both are reprinted in the appendix hereto, p. A-1 and p. B-1, infra.

The decision and opinion of the United States District Court for the Central District of Illinois is reported at 641

F.Supp. 249 (C.D. Ill. 1986) and is reprinted in the appendix hereto, p. C-1, infra.

JURISDICTION

This cause arose under 42 *United States Code* 1983, 1985. The United States District Court for the Central District of Illinois had jurisdiction under 28 *United States Code* 1331, 1343. On July 11, 1986, the District Court granted respondents' motion to dismiss.

The Court of Appeals for the Seventh Circuit had jurisdiction of this cause under 28 *United States Code* 1291. On June 8, 1988, the Court of Appeals entered a judgment and opinion holding the denial of Petitioners Rutan and Taylor's promotions and transfer due to their political affiliation was not unconstitutional unless the denials constituted constructive discharge. Judge Ripple dissented as to the holding of the Court that only denial of promotion and transfer constituting constructive discharge was unconstitutional.

The court further held the denial of an opportunity for employment due to Petitioner Moore's political affiliation was constitutional. The Seventh Circuit reached this conclusion in a roundabout manner essentially holding that federal courts are not open to address Petitioner Moore's claim or others' claims that they were denied a job due to their political beliefs or affiliation. The court admitted First Amendment rights were implicated in denial of a job but did not directly address the constitutional issues involved. If Petitioner Moore's constitutional rights have been violated the federal courts are not available to provide him redress. Thus, the Court de facto extended constitutional protection to every system of political hiring. Judge Ripple dissented from the Court's affirmation of the dismissal of Petitioner Moore's claim.

On August 17, 1988, the Court of Appeals granted petitioners suggestion for rehearing en banc.

On February 16, 1989, the Court of Appeals sitting en banc (Judges Wood and Flaum not participating) entered a judgment and opinion substantially the same as the initial opinion. Judge Ripple again dissented, joined by Judge Cudahy, as to the holding regarding petitioners Rutan and Taylor's claims. Judge Ripple further dissented from the affirmation of the dismissal of petitioner Moore's claim.

This Court has jurisdiction to review this case under 28 *United States Code* 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

42 *United States Code* 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 *United States Code* 1985:

> (1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;
>
> (2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the

> United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfuly, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;
>
> (3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property

on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF CASE

This case was decided on a motion to dismiss. Under a motion to dismiss under Federal Rule of Civil Procedure 12(b) (6), all well-pleaded allegations of the complaint are deemed admitted with every reasonable doubt resolved in favor of the pleader. *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969).

Petitioner Cynthia Rutan has worked for the Department of Rehabilitation Services of the State of Illinois since 1974. She has repeatedly applied for available promotions within the Bureau of Adjudicative Services where she works. She was qualified for those positions but has not been promoted. Those positions have been filled with persons less qualified than the Petitioner. Petitioner Rutan has not supported the Republican Party or its candidates financially or otherwise, but those put in the positions for which she had applied had supported that party.

Petitioner Franklin Taylor has worked for the Illinois Department of Transportation as an equipment operator since 1969. In July of 1983 Petitioner Taylor applied for a vacant lead worker position which would have been a promotion for him. Medford Phillips was promoted to that

vacancy. He was less qualified and had less seniority than did Petitioner Taylor but Phillips had the support and approval of the Fulton County Republican Party for that promotion. That approval was necessary to obtain the promotion. Petitioner Taylor could not obtain that approval due to his political affiliation.

Respondents denied Petitioners Rutan and Taylor the promotions they sought due to their political beliefs and party affiliation.

Petitioner Franklin Taylor also sought a geographical transfer from Fulton County to Schuyler County, the county in which he resides. This would have placed his work site closer to home. Respondents denied that transfer because the Republican County Chairmen in the two counties involved would not approve the transfer due to Petitioner Taylor's political beliefs and affiliation.

Petitioner James Moore was honorably discharged from the United States Army in 1958 and, thus, qualifies for veteran status in seeking employment with the State of Illinois. Since 1978 he has repeatedly sought employment with the State, particularly for available positions within the Department of Corrections. He was denied those jobs because he could not obtain the signatures of the Pope County Republican chairman and the Republican state representative. Petitioner Moore could not obtain the necessary signatures due to his political affiliation. Jobs for which he had applied, and for which he was qualified, were filled with persons less qualified, but those persons were affiliated with the favored political party. He was denied employment due to his political beliefs and affiliation.

The system which denied Petitioners promotions, transfer and employment itself is sophisticated. In late 1980, the approval for filling any position or for creating any new employment position was assigned to the Governor's Office

of Personnel. That Office controls all hiring, transfers, and promotions in all departments, boards and commissions under the jurisdiction of the Governor and is funded by tax dollars with a budget of at least $250,000.00. Five thousand positions are filled by that office each year either by promotion, transfer or hire.

The Republican Party screens employees and prospective employees to determine their past financial support of the Republican Party and its candidates, the future potential of such financial support, the potential of future "volunteer" work on behalf of the Republican Party and its candidates, and the voting history of the person and the voting history of relatives of such persons.

The Sangamon County Republican Central Committee form (Exhibit B attached to the Complaint) used to screen state employees for promotion, reads as follows:

SANGAMON COUNTY
REPUBLICAN CENTRAL COMMITTEE
200 SOUTH SECOND STREET,
SPRINGFIELD, IL 62701

PRINT OR TYPE

NAME _____ DATE _____

ADDRESS _____

PRECINCT _____ TOWNSHIP _____

TELEPHONE _____

VOTING ADDRESS IF DIFFERENT _____

PRECINCT _____

AGE _____ DATE OF BIRTH _____

SOCIAL SECURITY # _____

PRESENT POSITION _____ DEP'T _____

DESIRED POSITION _____ DEP'T _____

HOW LONG IN PRESENT POSITION _____

REASON FOR CHANGE___ ARE YOU QUALIFIED? ___

GIVE NAME OF TEST TAKEN _____

GRADE _____ DATE _____

FOR WHICH PARTY DID YOU VOTE IN PRIMARY ELECTIONS?

1984 _____ 1982_____ 1980_____ 1978_____

NOTE: if under age, question applies to parents.

Enter Name here:_____

DO YOU HOLD A MEMBERSHIP IN THE LINCOLN CLUB OF SANGAMON COUNTY? _____

WOULD YOU BE WILLING TO BECOME AN ACTIVE SANGAMON COUNTY REPUBLICAN FOUNDATION MEMBER? _____ (The foundation is a voluntary, financial assistance organization)

WOULD YOU BE WILLING TO CANVASS AND WORK YOUR PRECINCT OR NEIGHBORHOOD FOR CANDIDATES THE CENTRAL COMMITTEE RECOMMENDS AS QUALIFIED FOR LOCAL, STATE, AND NATIONAL OFFICES? _____

I AFFIRM THAT THE INFORMATION GIVEN ON THIS APPLICATION HAS BEEN ANSWERED HONESTLY TO THE BEST OF MY ABILITY.

_____
Signature of Precinct Committeeman

I RECOMMEND THE ABOVE APPLICANT BECAUSE___

_____

_____
Signature of Precinct Committeeman

The recommendations of the Republican Party are then forwarded to the Governor's Office of Personnel. That Office also independently checks the person's voting record and the voting records of the person's relatives. It then decides who will fill what position.

The filling of positions, be it promotion, transfer or hire, is based upon political factors, namely, the contribution of

money to the Republican party and the support of that party and its candidates. Those who are politically favored are promoted, transferred or hired. Those who are not so favored are not promoted, transferred or hired.

Petitioners filed suit under 42 *United States Code* 1983, 1985, as state employees and potential state employees, individually and on behalf of others similarly situated, charging that by denying them promotion, transfer and employment due to their political affiliation, the respondents had violated their First Amendment rights to freedom of speech and freedom of association as applied to the states by the Fourteenth Amendment to the United States Constitution.[3]

The Seventh Circuit, sitting en banc, held employment actions toward public employees based upon political belief or affiliation cannot give rise to constitutional claims unless those actions constitute constructive discharge. In so ruling the Seventh Circuit did not follow the rule of the majority of Circuits. Judges Ripple and Cudahy dissented following the holding of those circuits particularly the opinion of the Third Circuit in *Bennis v. Gable*, 823 F.2d 723 (3rd Cir. 1987).[4]

While admitting that the denial of employment did implicate petitioner Moore's First Amendment rights, the Seventh Circuit did not address the constitutionality of his claim under traditional First Amendment jurisprudence. The Seventh Circuit held the federal courts were not open to deal with his claim, thus, giving defacto constitutional

[3] The petitioners also claimed that this system of promotion, transfer and hiring violated their constitutional rights as voters. The petitioners are not pursuing those claims before this Court.

[4] While the Seventh Circuit remanded for determination of whether the denials of promotion and transfer constituted constructive discharge, the matter is final as to those members of the class petitioners Rutan and Taylor sought to represent whose denials of promotion and transfer do not constitute constructive discharge. The denial of their promotions and transfer, short of constructive discharge, due to their political beliefs and party affiliation is constitutional.

protection to all systems of hiring based upon political beliefs and affiliation.

REASONS FOR GRANTING THE WRIT

Introduction

It is difficult to set forth the reasons for granting the writ in this case any better than Judge Ripple did in his dissent to the en banc opinion:

> In this bob-tailed en banc proceeding, the majority has filed essentially the same opinion that was filed by the majority in the original panel's consideration of this matter. *Rutan v. Republican Party of Illinois*, 848 F.2d 1396 (7th Cir. 1988). I shall rely therefore on the separate opinion I filed when the case was before the panel. Id. at 1412. I note only that, with the Second Circuit's decision in *Lieberman v. Reisman*, 857 F.2d 896 (2d Cir. 1988), the division among the circuits appears to deepen. Apparently, government workers in Hartford, New York, Philadelphia, Pittsburgh, and Atlanta can expect protection when a local politician makes life uncomfortable because they do not knuckle under to his political will — even though politics has nothing to do with their jobs. In Chicago, and perhaps Richmond, the watchword is "politics as usual."

The need for Supreme Court review of this important question is evident. American citizens serving their country in state and local government ought not have their legal protection depend on the accident of where Congress decided to draw the administrative line separating one circuit from another. Review on certiorari is particularly ap-

propriate in this case because the majority's reasoning depends, to a great extent, on its disagreement with the governing precedent of the Supreme Court. See Supreme Court Rule 17.1(c) (certiorari appropriate "(w)hen . . . a federal court of appeals . . . has decided a federal question in a way in conflict with applicable decisions of this Court"). It may be that the majority has perceived correctly the winds of change. But change must come from the Supreme Court, not a regional court of appeals. For us, stare decisis must be the governing principle. (A 33-34)

I. The Decision Of The Seventh Circuit In This Case Is In Direct Conflict With The Decisions Of Other Circuit Courts Of Appeal

A. The Courts of Appeal Recognize That Denial of Promotion and Transfer Due To Political Beliefs and Political Affiliation Violates First Amendment Rights But The Courts of Appeal are Sharply Divided As to Whether That Denial Is Unconstitutional.

In its decision in this case the Seventh Circuit followed the Fourth Circuit in holding the denial of promotion and transfer must be "the substantial equivalent of dismissal," in order to state a cause of action. *Delong v. United States*, 621 F.2d 618, 624 (4th Cir. 1980) [5].

The Seventh Circuit's holding on promotion and transfer conflicts sharply with the majority of the Courts of Appeal. The majority of Circuits has held the public employer cannot condition a term of employment on political beliefs or political affiliation. In *Bennis v. Gable*, 823 F.2d 723 (3rd Cir. 1987)

the plaintiffs charged their demotions were a direct result of their political affiliation and their support of an unsuccessful mayoral candidate. The Court held the First Amendment protection extended to employment action short of discharge and said:

> Although *Pickering*, *Elrod* and *Branti* each involved dismissals from employment, the rationale of each dealt with the constitutionality of action adversely affecting an interest in employment in retaliation for an exercise of first amendment rights. As we read those cases, the constitutional violation is not in the harshness of the sanction applied, but in the imposition of any disciplinary action for the exercise of permissible free speech. "The first amendment is implicated whenever a government employee is disciplined for his speech." *Waters v. Chaffin*, 684 F.2d 833, 837 n. 9 (11th Cir. 1982) (demotion and transfer).
> 823 F.2d at 731 (emphasis added).

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[5] The Seventh Circuit had never before limited First Amendment protection of public employees to acts amounting to constructive discharge. Rather the Seventh Circuit had applied traditional First Amendment jurisprudence and had an outstanding record in protecting public employees' First Amendment rights: *Mueller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970) (written reprimand); *McGill v. Board of Education of Pekin Elementary School*, 602 F.2d 774 (7th Cir. 1979) (transfer); *Knapp v. Whitaker, et al.*, 757 F.2d 827 (7th Cir. 1985) (transfer); *Egger v. Phillips*, 710 F.2d 292 (7th Cir. 1983) (transfer); *Hermes v. Hein*, 742 F.2d 350 (7th Cir. 1984) (denial of promotion; summary judgment of the facts for defendants affirmed but underlying premise was that the complaint stated a cause of action); *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982) (harassment after public employee had run for public office and made statements on public issues and had supported another candidate after she lost the primary). Either the Seventh Circuit has reversed its holdings in these cases, sub silentio, or it has carved out denial of First Amendment protection when the association is political party affiliation.

In *Bennis* the Third Circuit followed its prior holding in *Robb v. City of Philadelphia*, 733 F.2d 286 (3rd Cir. 1984), where the Court had held that the public employee's allegations that he was transferred and also denied a promotion due to union activity and statements made to the press stated a cause of action. See also *Czurlanis v. Albanese*, 721 F.2d 98 (3rd Cir. 1983) (suspension).

In *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982), the Eleventh Circuit held that the First Amendment is always implicated when adverse action is taken against a public employee for having exercised free speech. The Court proceeded to apply the traditional balancing test, *Pickering v. Board of Education*, 391 U.S. 563 (1968), and then reversed the judgment entered in favor of the police department which had demoted the police officer.

In *Lieberman v. Reisman*, 857 F.2d 896 (2nd Cir. 1988), the plaintiff, a Republican, was an assistant to a Democratic office holder. Her salary, vacation pay and other benefits of employment were set by the town board most of whom were Democrats. After the plaintiff ran unsuccessfully for public office, the board denied her compensatory and vacation time. She sued charging that the action was due to her political affiliation.

The District Court dismissed the complaint and following *Delong*, held that political claims were limited to discharge. The Second Circuit reversed, rejecting *Delong* and adopting the *Bennis* holding. The Court said:

> While, as noted, a public employee's First Amendment rights are not absolutely protected, to affirm the dismissal of plaintiff's second cause of action might condone politically motivated harassment or other unconstitutional treatment of public employees in those cases where the public

> employer's action stops short of discharge.
> 857 F.2d at 900. (Emphasis added)

These Circuits have soundly rejected *Delong*. As Judge Ripple in this case said in the dissent:

> Although the *Delong* test attempts to apply the *Elrod* criteria to cases not involving discharge, its approach is an illusory one. It places an unrealistic burden of proof on the plaintiff and creates an impossible judicial task.
>
> To succeed, the plaintiff must establish that, although a reasonable person would resign under such pressure to his first amendment rights, he has decided to "hang on." It is not surprising that the *Delong* test would produce such an unrealistic burden of proof; it is premised on a fundamental misapprehension of the analysis required by established first amendment jurisprudence.
> 848 F.2d at 1412, B 32-33.

Petitioners submit the Seventh Circuit's holding that only employment actions constituting constructive discharge are actionable will lead to more litigation.

The implications of the Seventh Circuit's holding for individual public employees are clear. As Judge Ripple said:

> The majority's holding today will subject countless dedicated governmental workers, for whom party affiliation is not an "appropriate requirement for the effective performance of the public office involved, *Branti*, 445 U.S. at 518, to harassment because they have chosen not to contribute to or work for a particular candidate or cause. For instance, the clinical worker who has strong views on the abortion issue and refuses to support a candidate of opposing views may now be passed over for

> promotion, denied transfer to a more favorable location, or assigned the most undesirable tasks in the office. The worker who decides not to support a particular candidate because, in the worker's view, the candidate is not committed to racial equality can be treated in identical fashion. 848 F.2d at 1413, B 34.

The chilling effect of the Seventh Circuit decision on First Amendment rights cannot be overstated.

Today public employees in New York, Philadelphia, and Atlanta have greater First Amendment protection than public employees working in Milwaukee or Chicago.

This Court cannot allow such disparate treatment to continue. First Amendment rights must be accorded uniform protection.

B. The Courts of Appeal Are Also Divided As To Whether The Denial Of Public Employment Itself Due To Political Beliefs Or Affiliation Is Constitutional.

The Seventh Circuit in the instant case is the only Circuit to have held de facto that the denial of employment due to political beliefs or affiliation can never be unconstitutional. The other Circuit to have addressed political hiring narrowly limited its holding, after full factual development of the case, to the informal hiring system before it. *Avery v. Jennings*, 786 F.2d 233 (6th Cir. 1986).

The Sixth Circuit's decision in *Avery* was in direct contradiction to that Circuit's decision in *Marohinic v. Walker*, 800 F.2d 613 (6th Cir. 1986), where Court held that a First Amendment claim is stated where a former employee can demonstrate that his protected conduct motivated a former public employer to give potential employers negative references.

The decision of the Seventh Circuit in this case and the decision of the Sixth Circuit in *Avery* are in direct opposition to the decisions of other Circuit Courts of Appeal.

In *Clark v. Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984), the plaintiff applied for forty positions at the Library of Congress. He claimed that he was denied those positions due to his affiliation with the Young Socialist Alliance. The District Court dismissed this claim. The D.C. Circuit reversed, holding:

> The district court's judgment on this claim must be reversed and the claim must be remanded for consideration of whether Clark met his burden of proof under the standard applicable to first amendment-based employment discrimination claims.
> 750 F.2d at 101.

The Court then held the standard found in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), controlled:

> Under the Mt. Healthy standard, a plaintiff must prove that conduct protected by the first amendment was a "substantial" or "motivating" factor in the employer's decision not to act favorably on the plaintiff's application.
> 750 F.2d at 101. (Emphasis added)

Once the plaintiff has met that burden the burden shifts to the employer to demonstrate that it would have rejected the application even in the absence of the protected conduct.

In *Rosenthal v. Rizzo*, 555 F.2d 390 (3rd Cir. 1977), cert. denied, 434 U.S. 892 (1977) the Third Circuit found discharge and hiring comparable:

> In general, a state may not condition hiring or discharge of an employee in a way which infringes his right of political association.
> 555 F.2d at 392.

In *Cullen v. New York State Civil Service Commission*, 435 F.Supp. 546 (E.D.N.Y.), appeal dismissed, 566 F.2d 846 (2nd Cir. 1977), a case remarkably like the present case, the Court held that conditioning the hiring and promotion of persons for county jobs on political campaign contributions to local politicians was plainly unconstitutional. The Court recognized there was no right to public employment but held:

> . . . denial of employment or promotion may not be conditioned on the making of a financial contribution to a political party.
> 435 F.Supp. at 552.

In *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983), the Court held that inquiry into the private, off-duty personal life of an applicant for employment as a police officer violated her rights to privacy as guaranteed by the First Amendment. The Court said:

> A potential employee of the state may not be required to forego his or her constitutionally protected rights simply to gain the benefits of state employment. 726 F.2d at 469.

Such a drastic divergence of opinion requires this Court to intervene. Whether or not a person can be denied a job due to political beliefs or affiliation cannot depend on geography.

The Seventh Circuit's holding that no system of denial of employment due to political affiliation can ever be unconstitutional has overwhelming implications. This holding will effectively bar thousands of persons from pursuing their chosen occupation for certain professions and positions fall

exclusively within the province of public employment: law enforcement, corrections, regulation of certain industries, etc. Several other professions or positions are in large measure, if not overwhelmingly, within the province of public employment: education, child welfare, public aid, mental health, etc. To allow the state to bar persons from public employment because of their political beliefs and associations is to effectively bar these people from pursuing their chosen professions and employment. This Court simply cannot allow this situation to continue in Illinois, Wisconsin and Indiana while applicants for public employment in other Circuits do not face such a bar.

II. The Seventh Circuit's Decision In This Case Relegates First Amendment Rights To A Position Vastly Inferior To Fourteenth Amendment Rights.

Petitioners submit that the Seventh Circuit's holding in this case relegates First Amendment rights to a position vastly inferior to Fourteenth Amendment rights. In cases brought under 42 *United States Code* 1983, the Courts of Appeal have never applied the constructive discharge standard to a person denied a benefit of public employment due to race or sex. *Riordan v. Kempiners, et al.*, 831 F.2d 690 (7th Cir. 1987) (salary difference of state employees-sex); *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986) (harassment and retaliation of a fire department employee-race).

The Courts of Appeal have repeatedly recognized a cause of action brought under 42 *United States Code* 1983 for failure to hire due to race or sex. In *Van Houdnos v. Evans, et al.*, 807 F.2d 648 (7th Cir. 1986), the Seventh Circuit reversed a directed verdict for defendant and reinstated a jury verdict for the plaintiff who was denied a position at the Illinois State Museum due to her sex. In *Hill v. Metropolitan Atlanta Rapid Transit Authority*, 841 F.2d 1533 (11th Cir. 1988), the Court reversed the District Court's summary judg-

ment for the defendant as to certain individual applicants' claims that they were denied employment due to their race. In *Briggs v. Anderson*, 796 F.2d 1009 (8th Cir. 1986), the Court reversed the dismissal of the claims of certain applicants for public employment and the dismissal of claims of public employees denied promotion due to race.

There is no rational basis to relegate the right to freedom of speech and freedom of association to an inferior position vis-a-vis the right to be free from discrimination based upon race or sex. Decades before blacks were considered persons and over a hundred years before women were granted the right to vote, this nation established the right to freedom of speech and freedom of association. Those rights form the foundation of representative democracy. Those rights must not be relegated to a position inferior to Fourteenth Amendment rights in the promotion, transfer or hire of qualified persons for public employees.

III. The Seventh Circuit's Decision In This Case Is Inconsistent With Principles Previously Established By This Court.

In this case, the Seventh Circuit ignored the analysis required by long established First Amendment jurisprudence. Under that analysis, the initial question is whether the conduct in which plaintiffs engaged is protected by the First Amendment to the United States Constitution. Petitioners have the First Amendment right to support a particular political party, a particular candidate, or a particular political belief. Petitioners also have the right, also protected by the First Amendment, to refrain from supporting a particular party or candidate or political belief. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Roberts v. United States Jaycees*, 468 U.S. 610 (1984) and *Hudson v. Chicago Teachers Union*, 743 F.2d 1187 (7th Cir. 1984), aff'd 475 U.S. 292 (1986).

Once it is established that petitioners conduct is protected by the First Amendment, the burden shifts to the respondents to establish that the restrictions imposed on political beliefs or affiliation are justified by overriding interests of the state or important governmental needs. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967); *Illinois State Employees Union, Council 34, Etc. v. Lewis*, 473 F.2d 561 (7th Cir. 1972).

This Court confronted exercise of those fundamental First Amendment rights in *Elrod v. Burns*, 427 U.S. 347 (1976), and said:

> The cost of the practice of patronage is the restraint it places on freedoms of belief and association. In order to maintain their jobs, respondents were required to pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party, usually at the price of one of the first three alternatives. Regardless of the incumbent party's identity, Democratic or otherwise, the consequences for association and belief are the same. An individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job. He works for the election of his party's candidates and espouses its policies at the same risk. The financial and campaign assistance that he is induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and any assessment of his salary is tantamount to coerced belief. See *Buckley v. Valeo*, 424 U.S. 1, 19 (1976). Even a pledge of allegiance to another party, however ostensible, only serves

> to compromise the individual's true beliefs. Since the average public employee is hardly in the financial position to support his party and another, or to lend his time to two parties, the individuals ability to act according to his beliefs and to associate with others of his political persuasion is constrained, and support for his party is diminished. 427 U.S. at 355-356.

Petitioners submit the impact for those denied promotion, transfer, or a job itself is no less.

This Court has paid particular attention to the rights of applicants denied a State benefit due to their exercise of First Amendment rights. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Torcaso v. Watkins*, 367 U.S. 488 (1961).

This Court demonstrated there is no rational explanation for drawing a distinction between an "applicant's" First Amendment rights and an "employee's" First Amendment rights in *Perry v. Sinderman*, 408 U.S. 593 (1972). Assuming that teacher Sinderman had no employment rights did not decide the case. This Court held:

> "Thus, the respondent's lack of a contractual or tenure 'right' to reemployment. . .is immaterial to his free speech claims. 408 U.S. at 597.

In *Branti v. Finkel*, 445 U.S. 507 (1980), this Court reaffirmed its holding in *Elrod*. In *Branti* the incoming administration sought to fire assistant public defenders in order to hire those who were politically favored. In that sense *Branti* was a hiring case. As to hiring, this Court said:

> As the District Court observed at the end of its opinion, it is difficult to formulate any justification for tying either the selection or retention of an assistant public defender to his party affiliation:
>
> "Perhaps not squarely presented in this action,

> but deeply disturbing nonetheless, is the question of the propriety of political considerations emerging into the selection of attorneys to serve in the sensitive positions of Assistant Public Defenders. By what rationale can it even be suggested that it is legitimate to consider, in the selection process, the politics of one who is to represent indigent defendants accused of crime? No 'compelling state interest' can be served by insisting that those who represent such defendants publicly profess to be Democrats (or Republicans)." 445 U.S. at 520. (n. 14).

Most recently this Court addressed the First Amendment rights of an applicant in *Frazee v. Illinois Department of Employment Security*, _____ U.S. _____, 109 S.Ct. 1514 (1989). This Court reversed the Illinois court which had affirmed the denial of unemployment compensation to a man who refused to accept a job that forced him to work on Sundays. He claimed work on Sunday violated his religious beliefs. Applying the traditional First Amendment analysis, this Court said:

> The State offers no justification for the burden that the denial of benefits places on Frazee's right to exercise his religion. 109 S.Ct. at 1518.

A person may have no unconditional right to public employment, but he cannot be barred from employment for reasons that offend the Constitution.[6]

In its decision in this case the Seventh Circuit recognized that the petitioners Rutan, Taylor and Moore had engaged in conduct protected by the First Amendment. But the Seventh Circuit did not move on to the second step in the

traditional First Amendment analysis. The Seventh Circuit never identified the state interest that is so overriding as to justify tax dollars paid by Independents, Democrats and Republicans (of a different political philosophy from the incumbent administration) being spent as a reward to those who have supported the respondents. The Seventh Circuit never identified any overriding state interest that is served by having the Respondents' supporters and contributors receive promotions, transfers, or employment. The Seventh Circuit never identified what overriding state interest is served by denying promotion to those more qualified nor what interest is served by denying a job itself to those more qualified. The Seventh Circuit did not identify what state interest is served by denying promotions, transfers and jobs based on political beliefs and affiliation. If anything the First Amendment would indicate state interests in a representative democracy are served by the protection of freedom of speech and association. That amendment encourages persons to speak or associate, to remain silent, or to not associate as that person decides.

The Seventh Circuit also ignored the third step in traditional First Amendment analysis. If there is a State interest that justifies restricting First Amendment rights, that restriction must be stated in clearly understandable terms. How much money must be contributed to demonstrate the support necessary for a promotion? How much precinct work must be done to obtain the geographical transfer?

[6] Numerous law review articles conclude that political hiring is unconstitutional. *See, e.g.,* Comment, *Patronage and the First Amendment After Elrod v. Burns*, 78 Colum. L. Rev. 468, 476 (1978) ("Patronage hiring skews the electoral process by encouraging job applicants to affiliate with the incumbent party"); *The Supreme Court, 1975 Term*, 90 Harv. L. Rev. 56, 195 (1976) ("[I]n the hiring context, every applicant for every job is subject to such coercion"); Comment, *First Amendment Limitations on Patronage Employment Practices*, 49 U. Chi. L. Rev. 181, 200 (1982); Note, 29 Emory L. J. 1217 (1980); Comment, *Republicans Only Need Apply: Patronage Hiring and The First Amendment in Avery v. Jennings*,

The failure to use the traditional First Amendment analysis led the Seventh Circuit to its erroneous conclusions and led the Seventh Circuit to rule contrary to precedent clearly established by this Court.

CONCLUSION

For these reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Seventh Circuit to review the questions presented by this Petition.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 86-2073
CYNTHIA RUTAN, et al.,

Plaintiffs-Appellants,

v.

REPUBLICAN PARTY OF ILLINOIS, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 85 C 2369 — **Harold A. Baker**, *Chief Judge*.

ARGUED APRIL 7, 1987 — REARGUED
SEPTEMBER 27, 1988
DECIDED FEBRUARY 16, 1989

Before BAUER, *Chief Judge*, CUMMINGS, CUDAHY, POSNER, COFFEY, EASTERBROOK, RIPPLE, MANION and KANNE, *Circuit Judges*.*

MANION, *Circuit Judge*. Plaintiffs appeal the district court's dismissal of their complaint challenging a public employer's use of political considerations in hiring, rehiring,

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* Judge Wood, Jr. and Judge Flaum did not participate in the argument or decision in this case.

transferring and promoting employees. *See Rutan v. Republican Party of Illinois*, 641 F.Supp. 249 (C.D. Ill. 1986). We affirm in part, reverse in part, and remand.

I.
NATURE OF THE CASE

In their complaint, plaintiffs alleged that Governor James R. Thompson of Illinois, the Republican Party of Illinois, and various state and Republican Party officials use political considerations in hiring, rehiring from layoffs, transferring and promoting state employees under Governor Thompson's jurisdiction. Because we are reviewing the district court's dismissal of the complaint for failure to state a claim upon which relief can be granted, we take the allegations in the complaint as true. *See LaSalle National Bank of Chicago v. County of DuPage*, 777 F.2d 377, 379 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 2892 (1986).

According to the detailed complaint, approximately 60,000 state employees work in more than fifty "departments, boards and commissions under the jurisdiction" of Governor Thompson. On November 12, 1980, Governor Thompson issued an executive order "which requires his personal approval or that of a designee before any individual may be hired or promoted." The executive order, which is attached to the complaint, states:

> HIRING FREEZE
>
> Effective at the close of business today, November 12, 1980, no agency, department, bureau, board or commission subject to the control or direction of the Governor shall hire any employee, fill any vacancy, create any new position or take any other action which will result in increases, or the maintenance of present levels, in State employment, including personal service contracts. *All*

> *hiring is frozen.* There will be *no* exceptions to this order without my express permission after submission of appropriate requests to my office.

(emphasis in original). Governor Thompson has assigned power over significant employment decisions to the "Governor's Office of Personnel." Plaintiffs contend that the Office of Personnel's employment decisions are

> . . . substantially motivated by political considerations. Such political considerations include whether the individual under consideration is Republican or a relative or friend of a Republican, is sponsored by an influential Republican, is a financial supporter of the Republican party or an influential Republican, is a friend or supporter of defendant Thompson, or is sponsored by those who are friends or supporters of defendant Thompson, or is sponsored by a member of the Illinois General Assembly who is deemed to be a friend or supporter of defendant Thompson.

This patronage employment system, plaintiffs claim, creates a significant political advantage "in favor of the 'ins,' i.e., Defendant James Thompson and his political allies, and against the 'outs,' i.e., those who may wish to challenge him in elections."

The defendants are Governor Thompson, the Illinois Republican Party, seven current or former state officials and two Republican Party officials. Plaintiffs sued two of the state officials as class representatives, one as a representative of all "directors, heads or chief executive officers . . . since 1981" of state agencies under the Governor's jurisdiction and the other as a representative of all persons who acted as "liaisons" between those state agencies and the Governor's Office of Personnel. Plaintiffs sued the Republican Party officials as representatives of the class of "all Republican State Central Committee and County Central Committee officials and members . . . since February 1, 1981."

Plaintiffs brought this action both as individuals and as representatives of six different classes. These classes are: (1) voters; (2) taxpayers; (3) politically unacceptable employees denied promotions; (4) politically unacceptable employees denied transfers; (5) politically unacceptable employees who have not been rehired after being laid off; and (6) politically unacceptable employment applicants who have applied for but not received a job.

Plaintiff Cynthia Rutan has worked for the Department of Rehabilitative Services since 1974. She has neither been active in the Republican Party nor supported Republican candidates. Since 1981, Rutan has applied for promotion into supervisory positions in the Department of Rehabilitative Services. Defendants allegedly filled each of these supervisory positions with someone less qualified but "favored on a political basis by the Governor's Office of Personnel." Rutan sued on her own behalf and as a class representative of those denied promotions as a result of the patronage system.

Plaintiff Franklin Taylor works for the Department of Transportation. He does not support the Republican Party. In 1983, Taylor applied for a promotion. A less qualified person, whom the Fulton County Republican Party supported, received the promotion. Taylor subsequently requested a transfer to a different county. Taylor was allegedly advised that he was not transferred because the Republican Party chairmen of Fulton and Schuyler Counties opposed the transfer. He sued on his own behalf and a class representative of those denied promotions and transfers as a result of the patronage system.

Plaintiff Ricky Standefer was hired in a temporary position at the State Garage in Springfield in May, 1984. In November of that year he and five other employees were laid off. The five other employees, who had Republican Party support, were offered other state jobs. Standefer, who had

voted in the Democratic primary, was not. He sued on his own behalf and as a class representative of those who, as a result of the patronage system, have not been rehired after being laid off.

Plaintiff Dan O'Brien was employed as a "Dietary Manager I" at the Department of Mental Health and Developmental Disabilities' Lincoln Development Center. O'Brien has voted only once in a primary, and that was in a Democratic Party primary. O'Brien was laid off on April 5, 1983. Under the "Rules of the Department of Central Management Services," a laid-off employee can be recalled within two years. If recalled, the employee's benefits continue and he does not lose seniority. In December of 1984, an administrator at the Lincoln Development Center told O'Brien that he would be recalled. The administrator stated, however, that he was waiting to receive the necessary exception to Governor Thompson's hiring freeze. In February of 1985, O'Brien was told that the Governor's Office had denied him an exception to the freeze. "Several months" after being laid off, O'Brien attempted to and "ultimately" did receive employment with the Department of Corrections. He obtained this job after obtaining the support of the Chairman of the Logan County Republican Party. This job paid less money than his previous job. O'Brien sued on his own behalf and as a class representative of those who, as a result of the patronage system, have not been rehired after being laid off.

Plaintiff James Moore "has sought employment with the State of Illinois particularly with the Department of Corrections" since 1978. In 1980, Moore received a letter from a Republican state representative informing him that he would have to "receive the endorsement of the Republican Party in Polk County before I can refer your name to the Governor's office." Moore alleges that while he was attempting to obtain a position with the state, the son of the chairman

of the Polk County Republican Central Committee, the "son-in-law of the Vice-chairman and precinct committeewoman of the Polk County Republican Central Committee," and a Republican precinct committeeman were hired by the State in positions for which Moore was qualified. Moore sued on his own behalf and on behalf of all those denied employment as a result of the patronage system.

Plaintiffs also brought claims as voters and taxpayers. They claimed to represent a class of voters "who are entitled to cast their votes and use the election process to change and influence the direction of government and who have an interest in having a voice in government of equal effectiveness with other voters." They also claimed to represent a class of taxpayers who "are entitled to have monies provided by the taxpayers of Illinois spent only for State purposes and not spent on the operation and maintenance of a State political patronage system." As voters, plaintiffs claimed that the patronage system has diminished the value of their votes, thus denying them "a voice in government of equal effectiveness with other voters." As taxpayers, plaintiffs claimed to have been deprived of tax "monies . . . which have been expended for the support of the patronage system and not for a governmental purpose."

Plaintiffs sought relief under numerous federal and state law theories. *See Rutan*, 641 F. Supp. at 252-59. On appeal we are concerned with two: (1) their claims as employees or potential employees that the patronage system violated their rights under the First Amendment as applied to the states through the Fourteenth Amendment; and (2) their claims as voters that the patronage employment system violated the Fourteenth Amendment by denying them equal access and

effectiveness in elections.[1] As relief, plaintiffs sought over a billion dollars in damages and transfer of the Governor's control over the state employment system to a federal receiver.

Defendants moved to dismiss the complaint under Fed. R.Civ.P. 12(b)(6) on the ground that it failed to state a claim for relief. The district court granted defendants' motion. *See Rutan*, 641 F.Supp. 249 (C.D.Ill. 1986). This appeal ensued.

II.
ANALYSIS

A. *The District Court's Failure to Consider the Class Action Question.*

Before addressing the substantive issues raised on this appeal, we must first address the district court's failure to consider whether plaintiffs may properly bring this case as a class action. The district court dismissed the complaint under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted but did not first consider whether the action may be properly brought as a class action. This vio-

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[1] In the portion of their briefs denominated "Statement of Questions" plaintiffs purported to raise an equal protection claim based on their capacities as employees and employment applicants. Plaintiffs' employment claims, however, rise and fall on their First Amendment claims because their arguments in the brief are argued solely under the First Amendment. Whatever its merits, plaintiffs' failure to argue their equal protection claim waived that claim. *See Sanchez v. Miller*, 792 F.2d 694, 703 (7th Cir. 1986), *cert. denied*, 479 U.S. 1056 (1987).

Plaintiffs also appeal the district court's decision to dismiss, for lack of pendent jurisdiction, their state law claim brought as taxpayers. Because we remand four plaintiffs' employment claims, the district court should consider on remand whether it should exercise pendent jurisdiction over that claim. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). Any consideration of that claim should also, as with all claims brought in federal court, analyze whether plaintiffs have standing to bring those claims.

lates Fed.R.Civ.P. 23(c)(1), which requires the district court to address the issue of class certification "as soon as practicable." *See Hickey v. Duffy*, 827 F.2d 234, 237 (7th Cir. 1987); *Bennett v. Tucker*, 827 F.2d 63, 66-67 (7th Cir. 1987). The district court's failure to address the class action issue does not deprive us of jurisdiction under 28 U.S.C. § 1291. The district court's order dismissed the suit in its entirety, leaving nothing to be decided in that court. *See Hickey*, 827 F.2d at 238; *see also Gomez v. Illinois State Board of Education*, 811 F.2d 1030, 1034 n.1 (7th Cir. 1987). Thus, even though the district court should have addressed the class action issue, its failure to do so does not destroy the finality of its decision.

The failure to address the class action issue, however, does limit the scope of our judgment. Because no class of plaintiffs or defendants were certified, only the named plaintiffs and named defendants are before this court. *See Hickey*, 827 F.2d at 238 (citing *Board of School Commissioners v. Jacobs*, 420 U.S. 128, 130 (1975)). Therefore, we treat plaintiffs' claims as being brought solely by the named plaintiffs against the named defendants. *See Roberts v. American Airlines, Inc.*, 526 F.2d 757, 762-63 (7th Cir. 1975); *see also Pharo v. Smith*, 621 F.2d 656, 663-64 (5th Cir. 1980), *modified on other grounds*, 625 F.2d 1226 (5th Cir. 1980) (per curiam).

B. *Patronage Employment Claims*

Plaintiffs' employment claims challenge the validity of a longstanding feature of American politics. Each plaintiff claims that he or she did not receive some favorable employment decisions because political considerations substantially motivated the defendant's employment decisions. Plaintiffs argue that the defendants placed an unconstitutional burden on their freedom of belief and association guaranteed by the First Amendment by relying upon political considerations in making employment decisions. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association . .

. . presupposes a freedom not to associate."). On the other hand, defendants argue that the district court properly dismissed plaintiffs' claims because the First Amendment does not require absolute political neutrality by a public employer in making employment decisions. According to defendants, public employer patronage practices violate the First Amendment only if an employee whose party affiliation is not a necessary requirement for his job is discharged or threatened with discharge. Thus, we must resolve two issues in addressing these claims: (1) whether, and to what extent, a public employer may take political affiliation into account in making employment decisions; and (2) whether, under the appropriate substantive rule, the district court properly dismissed plaintiffs' claims.

For years, hiring and retaining public employes rested exclusively within the legislature's and executive's discretion. A public employee's challenge to a particular employment practice that affected his free expression was met with Justice Holmes' famous pronouncement as a member of the Supreme Judicial Court of Massachusetts that, "[a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, (1892); *see generally Connick v. Myers*, 461 U.S. 138, 143-44 (1983). The latter half of this century has seen employees' rights broadly expand and legislative and executive discretion correspondingly diminish. *See Connick*, 461 U.S. at 143-47. The Supreme Court has struck down state laws that required public employees to take an oath denying past or present affiliation with the Communist Party, or other "subversive" organizations, *Wiemmann v. Updegraff*, 344 U.S. 183 (1952), as well as laws that barred members of the Communist Party and other "subversive" organizations from state employment, *Keyishian v. Board of Regents*, 385 U.S. 589, 609-10 (1967). Other cases have firmly established that a public employee may not be discharged for speaking out

on matters of public concern. *See, e.g., Pickering v. Board of Education*, 391 U.S. 563 (1968). Moreover, retribution short of discharge that is directed at an employee's speech has also been held to violate the First Amendment. *See Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982).

Although broad, public employees' First Amendment rights are not absolute. The First Amendment requires us to balance the employee's interest in free expression against the State's legitimate interests served by the challenged practice. *See Pickering v. Board of Education*, 391 U.S. at 568; *cf. Buckley v. Valeo*, 424 U.S. 1 (1976). Thus, discharging an employee whose complaints about the workplace disrupt the workplace and undermine a supervisor's authority does not violate the First Amendment. *See Connick*, 461 U.S. at 150-54 (1983). Similarly, public employer work rules that are legitimately related to the workplace's effective functioning and "not aimed at particular parties, groups or points of view" do not violate the First Amendment even though the rules may negatively affect employees' speech or political association. *See Civil Service Comm'n v. Nat'l Assoc. of Letter Carriers*, 413 U.S. 548, 564 (1973) (upholding Hatch Amendment restrictions on political activities by federal employees); *cf. Bart*, 677 F.2d at 624-25 (upholding rule requiring employee-candidate to take leave of absence while campaigning).

There are few areas where the balancing of interests under the First Amendment analysis is more sharply debated, or more uncertain, than the area of political patronage in employment. The Supreme Court first addressed the validity of patronage employment practices in *Elrod v. Burns*, 427 U.S. 347 (1976). In *Elrod*, a Democrat succeeded a Republican in the Cook County, Illinois Sheriff's Office. The new sheriff discharged some of the incumbent employees and threatened to discharge others because they were not affiliated with or sponsored by the Democratic Party. A

divided Supreme Court held that this practice violated the First Amendment.

Drawing heavily upon *Keyishian* and *Pickering*, a three-justice plurality stated that the patronage dismissals unnecessarily restricted political belief and association and that "any contribution of patronage dismissals to the democratic process does not suffice to override their severe encroachment of the First Amendment freedoms." 427 U.S. at 372-73 (plurality). Although generally unimpressed with patronage practices, the plurality did limit its consideration of the issues to patronage dismissals and not to other patronage practices. *Id.* at 353 (plurality). Moreover, Justice Stewart's concurrence (in which Justice Blackmun joined) expressly limited the Court's holding to cases where, solely on the basis of political belief, a nonpolicymaking, nonconfidential employee is discharged or threatened with discharge from a job that he is satisfactorily performing. 427 U.S. at 375 (Stewart, J. concurring).

The Court next addressed patronage employment in *Branti v. Finkel*, 445 U.S. 507 (1980), and slightly modified its holding in *Elrod*. In *Branti*, two Republican assistant public defenders sued after a newly-elected Democratic public defender threatened them with discharge. The Court ruled for the assistants, holding that a public employer cannot discharge an employee based on party affiliation unless "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518. Again the Court expressly limited its consideration of the issues to patronage dismissals. *Id.* at 513 n.7.

In light of the limited nature of the Supreme Court's holdings in *Branti* and *Elrod*, the courts of appeals generally have hesitated to extend the rule those cases enunciated. In *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984), this circuit affirmed the dismissal of a complaint filed by a contractor who alleged that a mayor

violated the contractor's First Amendment rights by rejecting the contractor's bid for a city contract because the contractor did not support the mayor politically. In reaching its conclusion, the *LaFalce* court balanced the interference with political expression caused by the patronage practice against "the consequences of trying to prevent . . . [the interference] through an interpretation of the Constitution." *Id.* at 293-94.

The court first found that a contractor's loss of a particular bid was less disruptive than an employee's loss of a job; a contractor still has other potential contracts to bid on. Moreover, the interference was not likely to affect many businesses, given that most stay on good terms with all major political parties. *Id.* at 294.

The court then determined that the costs of attempting to interfere with the patronage practices outweighed any interference with political affiliations.

> [A]gainst the uncertain benefits of such a rule in promoting the values of the First Amendment must be set the unknown but potentially large costs. To attempt to purge government of politics to the extent implied by an effort to banish partisan influences from public contracting will strike some as idealistic, others as quixotic, still others as undemocratic, but all as formidable. Patronage in one form or another has long been a vital force in American politics. Civil service laws, . . . requiring public contracts to be awarded to the low bidder, laws regulating the financing of political campaigns, and decisions such as *Elrod* and *Branti*, have reduced the role of patronage in politics but have not eliminated it entirely. The desirability of reducing it further raises profound questions of political science that exceed judicial competence to answer. . . .

Id. The court also expressed concern that public officials would be subject to suit by disappointed bidders each time the city awarded a bid. Finally, the court expressed reluc-

tance to "take so big a step in the face of the Supreme Court's apparent desire to contain the principle of *Elrod* and *Branti*." *Id.* at 294-95; *see also Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986) (en banc) (partisan dismissal of motor vehicle agents who were independent contractors, not employees, held not to violate First Amendment); *Sweeney v. Bond*, 669 F.2d 542, 545-46 (8th Cir.) (partisan dismissals of "fee agents" who were independent contractors held not to violate First Amendment), *cert. denied*, 459 U.S. 878 (1982).

In the employment context, the courts of appeals have extended *Branti* and *Elrod* beyond outright discharges and threats of discharges. For example, the courts have held that partisan decisions not to allow an employee to retain his job after the employee's "official" term of employment expires may violate the First Amendment. *See McConnell v. Adams*, 829 F.2d 1319 (4th Cir. 1987); *Furlong v. Gudknecht*, 808 F.2d 233 (3d Cir. 1986); *McBee v. Jim Hogg County*, 730 F.2d 1009 (5th Cir. 1984). An open question remains, however, over whether burdens imposed by a patronage system rise to the level of a constitutional violation in situations that are not equivalent to the loss of employment.

In *DeLong v. United States*, 621 F.2d 618 (4th Cir. 1980), the Fourth Circuit limited employees' challenges to patronage practices to those practices that "can be determined to be the substantial equivalent of dismissal." *id.* at 624. In that case, the plaintiff, a Republican, challenged his transfer and reassignment from his position as State Director of the Farmers Home Administration in Maine to a position as a project assistant in Washington, D.C. The plaintiff had been transferred and reassigned as part of a policy of the Secretary of Agriculture to replace Republican state directors with Democrats.

The district court granted the government summary judgment on the ground that plaintiff's position as a state director was a "policymaking" position. On appeal, the Fourth Circuit

reversed and remanded the case to be considered under *Branti*'s newly articulated test: whether "party affiliation is an appropriate requirement for the effective performance of the public office involved." *DeLong*, 621 F.2d at 622 n.2 (quoting *Branti*, 445 U.S. at 519). In so holding, the court rejected the government's argument that the patronage assignment and transfer of an employee protected under *Branti* and *Elrod* could never constitute an unconstitutional burden upon an employee's beliefs and associations. The court did, however, limit such challenges to those patronage practices which, while not actual or threatened discharges, could be considered tantamount to a dismissal. *Id.* at 623-24. In pertinent part the court reasoned:

> Dismissal or the threat of dismissal for political patronage reasons is of course the ultimate means of achieving by indirection the impermissible result of a direct command to a government employee to cease exercising protected rights of free political association and speech. This is *Elrod*'s and *Branti*'s specific, narrow application of the principle. We believe that when the principle is applied to patronage practices other than dismissal it is rightly confined to those that can be determined to be the substantial equivalent of dismissal.
>
> In applying the principle, so limited, to the actual or threatened reassignment or transfer of a government employee, the issue thus becomes whether the specific reassignment or transfer does in fact impose upon the employee such a Hobson's choice between resignation and surrender of protected rights as to be tantamount to outright dismissal. This much and no more, we conclude, is a necessary implication from the broader principle drawn upon in *Elrod*.... It is obvious that not every reassignment or transfer can fairly be thought to have this quality. It is equally obvious that in practical terms some might.

Id.

The "substantial equivalent to a dismissal" standard focuses on the same question presented in constructive discharge cases, that is, whether a particular patronage decision would lead a reasonable person in the plaintiff's position to feel compelled to leave his job. *See, e.g., Parrett v. City of Connersville*, 737 F.2d 690 (7th Cir. 1984); *see also Patterson v. Portch*, 853 F.2d 1399, 1405-07 (7th Cir. 1988). In the course of most, if not all, people's employment a wide variety of disappointments, and possibly some injustices, occur. Most of these are normal incidents of employment that would not lead a reasonble person to quit. *See Bristow v. The Daily Press, Inc.*, 770 F.2d 1251 (4th Cir. 1985) (denial of promotion in and of itself cannot constitute a constructive discharge); *Schaulis v. CTB/McGraw-Hill*, 496 F.Supp. 666 (N.D. Cal. 1980) ("An employer has not effected a constructive discharge merely because an employee believes that she has . . . limited opportunities for advancement."). However, whether a particular action can be viewed as "substantially equivalent to a dismissal" (or a constructive discharge) is not subject to hard and fast rules. The court must take all the case's circumstances into account.[2] Being placed in a sinecure may be some employee's idea of the ultimate job. For other employees, enforced idleness may be a humiliating experience as well as one that may permanently impair an employee's professional skills. *See Parrett*, 737 F.2d 690. Moreover, there may be special circumstances that sharply

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[2] Many constructive discharge cases in the employment discrimination area have required that the employer specifically intend for an employee to resign. *See Bristow*, 770 F.2d 1251, 1255 (4th Cir. 1985) (Title VII). This appears to be an open question in this circuit. See *Henn v. National Geograph Society*, 819 F.2d 824, 829 (7th Cir. 1987). *DeLong* does not place any such requirements in patronage cases, nor do we think it would be appropriate to do so. *Branti*, *Elrod*, and *DeLong* all focus on the burden a patronage system places on an employee, not on the employer's intent to impose the burden.

increase the severity of impact of what might otherwise be viewed as a routine employment decision. Under the *DeLong* analysis a court may take all these circumstances into account. *DeLong*, 621 F.2d at 624. The ultimate issue remains, however, whether a particular patronage decision "imposed so unfair a choice between continued employment and the exercise of protected beliefs and associations as to be tantamount to the choice imposed by threatened dismissal." *Id.*

In contrast to the Fourth Circuit's analysis in *DeLong*, the Third Circuit has recently held that the rule enunciated in *Branti* and *Elrod* extends to any "disciplinary action" by a public employer. In *Bennis v. Gable*, 823 F.2d 723 (3d Cir. 1987), a group of police officers brought suit against several defendants. The officers alleged that the defendants demoted them for engaging in political activity, or alternatively, that the defendants demoted them to make room for the new mayor's political supporters. On appeal, the defendants argued that plaintiffs' claims that they were demoted to make room for political supporters failed as a matter of law. The defendants contended that the rule enunciated in *Branti* and *Elrod* was strictly limited to patronage discharges and did not extend to practices that placed lesser burdens on plaintiffs' associational interests. The Third Circuit rejected both this argument and the "substantial equivalent to dismissal" standard set forth in *DeLong*. *Id.* at 731 n.9. According to the Third Circuit, the rule enunciated in *Elrod* and *Branti* was not limited by the harshness of a particular action but rather extended to the imposition of any "disciplinary action" imposed for the exercise of First Amendment rights.

DeLong and *Bennis* enunciate significantly different standards for analyzing patronage claims. *DeLong* limits the rule enunciated in *Branti* and *Elrod* to constructive discharges. On the other hand, *Bennis* apparently extends the rule to a wide range of employment decisions, including decisions

concerning routine transfers and promotions. We believe the *DeLong* analysis is more sound.[3]

DeLong properly extends *Branti*'s and *Elrod*'s protections beyond those decisions' narrow holdings to protect employees from patronage practices that may, as a practical matter, impose the same burden as outright termination. As we explain below, however, the *DeLong* analysis also properly takes into account the limited nature of the Court's holdings in *Branti* and *Elrod* and the fact that real differences exist between dismissals and other patronage practices. It also takes into account the substantial intrusion of the federal

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[3] In adopting the *DeLong* analysis, we recognize that language in *Hermes v. Hein*, 742 F.2d 350 (7th Cir. 1984) indicates that a public employer may never take political factors into account. In *Hermes* two police officers alleged that they were denied promotions because eligibility tests and examination scores were "rigged" to favor other candidates who had local political support. The district court granted summary judgment on the ground that there was no evidence that political affiliations entered into the decision. On appeal, this court stated that "the district court's grant of summary judgment will be sustained if the only reasonable inferences from the record are that [the allegedly politically-favored candidates] would have been promoted regardless of their political affiliations." 742 F.2d at 353. The court then affirmed the grant of summary judgment.

Defendants here distinguish *Hermes* on the ground that *Hermes* involved "rigged" test scores and eligibility lists. We do not find that distinction persuasive. Whatever the effect such conduct may have on other rights, we do not believe the First Amendment issue turns on whether political factors are taken into account in an underhanded manner. Nonetheless, the language in *Hermes* does not control this case. The holding of a previous panel of this circuit is binding on other panels. Dictum is not. *See generally United States v. Crawley*, 837 F.2d 291 (7th Cir. 1988). And the language in *Hermes* must be considered dictum. Because of its summary disposition of the case the panel did not, nor did it need to, test the merits *of an extension of Branti* and *Elrod*. The panel merely cited *Branti* and *Elrod* in a footnote for the undisputed proposition that the right not to associate is protected under the First Amendment. There is no discussion of the reluctance expressed in *LaFalce* to extend *Branti's* and *Elrod*'s holdings or of the Fourth Circuit's

(Footnote continued on next page)

courts into the political affairs of the States and other branches of the federal government that would necessarily flow from extending *Branti* and *Elrod* beyond constructive discharges.

By favoring political supporters or those who are connected with political supporters, a patronage system will unquestionably have some negative effects on those people who did not support or are not connected with the party or faction in power. The partisan denial of a promotion, transfer, or employment application leaves someone in a possibly lesser position than he would have been absent patronage considerations. At the same time, however, the burden imposed by such patronage decisions is much less significant than losing a job.

While we recognize that in a certain economic sense the failure to win a job may harm a person as much as the failure to keep one, we follow the plurality's approach in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). There the plurality stated that an affirmative action plan's dis-

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[3] *continued*

decision in *DeLong*. There is also no indication that, on appeal, the defendants challenged any unprecedented expansion of *Elrod*. If the patronage issue was necessary to its holding, the court would have gone into these issues in great detail. Moreover, we note that *Hermes* has not been cited in any patronage case decided by other circuits. Accordingly, because the language contained in *Hermes* is dictum, it does not control this case.Futhermore, contrary to plaintiffs' suggestion, *Danenberger v. Johnson*, 821 F.2d 361 (7th Cir. 1987) does not support the proposition that patronage promotion decisions violate the Constitution. In *Danenberger* the court upheld the dismissal of plaintiff's complaint on the grounds of qualified immunity because no clearly established right to a promotion decision free of any political considerations existed at the time of the challenged promotion decision. *Id.* That the claim was dismissed on qualified immunity grounds in no way implies that such a constitutional right exists, *see Benson v. Allphin*, 786 F.2d 268, 279 n.26 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986); it means only that either there is no right, or if there is a right, it is not clearly established in the time at issue.

criminatory effects may be justified when it involves losing future employment opportunity but not when it involves losing a present position. The plurality reasoned that losing an employment opportunity is not as intrusive as losing an existing job. *Wygant*, 476 U.S. at 279-84 (plurality); *see also Steelworkers v. Weber*, 443 U.S. 193, 208 (1979) ("That [affirmative action] plan does not require the discharge of white workers and their replacement with black hirees."). An employee on the job has an important stake in his position with his employer. His financial affairs and other obligations will be arranged around certain settled expectations that his paychecks will continue. The coercion and control that an employer may exercise over an employee by threat of termination is great. On the other hand, an applicant seeking employment has not arranged his affairs around any expectation of an income stream from the job he seeks. Instead of depriving him of his livelihood, a patronage system lowers his chances for receiving employment at one of many potential employers. If he is employed elsewhere, a rejected application will probably have little effect on his income.

Likewise, absent unusual circumstances, employment decisions not involving dismissals, such as failing to transfer or promote an employee, are significantly less coercive and disruptive than discharges. While a person denied a promotion or transfer will certainly be disappointed and may remain in a lower-paying position, he still retains his job and his ability to meet his financial obligations.

The Sixth Circuit implicitly recognized the distinction between patronage discharges and less burdensome patronage practices in *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986), which upheld patronage hiring practices against First Amendment attack. The plaintiff in *Avery* unsuccessfuly applied for positions in three different county departments controlled by Republicans. The department heads filled vacancies with friends and relatives and

with friends and relatives of their political supporters. Of the 432 persons hired in the three departments over a seven-year period, only ten were Democrats. The plaintiff did not receive a job because she was not connected to the patronage network. The three department heads testified at their depositions that they preferred hiring Republicans. One testified that he "would favor hiring qualified Republicans." Another stated that "All things being equal I prefer to have a Republican working for me because I assume that he will be more interested in taking part in helping me get reelected." The third stated that "It just works better when people have the same philosophy." The district court granted summary judgment to the defendants because, among other reasons, *Elrod* and *Branti* did not extend to politically motivated hirings.

The Sixth Circuit affirmed. The court found that the First Amendment did not forbid a patronage system that relies on family, friends, and political allies for recommendations. While the court stated that a public employer could not bar a person from employment "solely" because of his political affiliation, the employer could rely on political factors in making decisions. The Sixth Circuit reasoned that the challenged patronage system was markedly different from public employer actions that the Supreme Court had declared unconstitutional. The challenged patronage system had many legitimate purposes such as finding good employees, extending political and personal friendships, and enhancing the official's performance and political appeal. Moreover, the court noted that any rule forbidding an employer from considering political affiliation in hiring would require invalidating hiring practices in public offices nationwide.

When balanced against the more limited burdens imposed by patronage practices other than dismissing or constructively discharging an employee, other interests strongly weigh against broadly expanding the rule *Branti* and *Elrod* enun-

ciated. In a representative government, courts must afford the political process and political institutions great deference. Extending *Branti* and *Elrod* to virtually all employment decisions would raise profound questions concerning democratic institutions that this court has previously found beyond our competence to answer. *See LaFalce*, 712 F.2d at 294.

Moreover, using political considerations in employment decisions is as old as this country. Although the age of a particular practice does not immunize it from constitutional challenge, *see, e.g., Brown v. Board of Education*, 347 U.S. 483 (1955), "[i]f a thing has been practiced for two hundred years, it will need a strong case for the Fourteenth Amendment to effect it." *Jackman v. Rosenbaum*, 260 U.S. 22 (1922) (Holmes, J.). Thus, it is not irrelevant to our inquiry that George Washington and Thomas Jefferson were no strangers to either patronage hiring or the First Amendment. *See Elrod*, 427 U.S. at 377-78 (Powell, J., dissenting). The more widespread use of patronage, beginning with Andrew Jackson and extending to modern times, has been credited with increasing the level of paticipation in American politics. *Id.* at 377-80. By increasing the level of participation in American politics, patronage has also been credited with adding balance and stability to government. *Id.; see also Branti*, 445 U.S. at 526-32 (Powell, J., dissenting). As Justice Powell has stated in support of patronage practices, even when they included termination:

> Broad-based political parties supply an essential coherence and flexibility to the American political scene. They serve as coalitions of different interests that combine to seek national goals. The decline of party strength inevitably will enhance the influence of special interest groups whose only concern all too often is how a political candidate votes on a single issue. The quality of political debate, and indeed the capacity of government to function in the national interest, suffer when

> candidates and officeholders are forced to be more responsive to the narrow concerns of unrepresentative special interest groups than to overarching issues of domestic and foreign policy."

Branti, 445 U.S. at 352 (Powell, J., dissenting).

Finally, we note that the practical considerations that this court relied on in *LaFalce* are even more compelling in this case. Recognizing the rights asserted by plaintiffs in this case would potentially subject public officials to lawsuits every time they make an employment decision. We doubt that there is a single disappointed employee who could not point to political disagreement, or simply lack of agreement between himself and a hiring official or the person who received the desired position. Political issues and beliefs do not come in neat packages wrapped "Democratic" and "Republican." A wide variety of issues, interests, factions, parties, and personalities shape political debate. Moreover, it is questionable whether "politics" could be meaningfully separated from other considerations such as friendships, compatibility, and the enthusiasm to pursue the stated job goals. The Supreme Court has shown great reluctance to have the federal courts preside as a platonic guardian over state employment systems. *See Bishop v. Wood*, 426 U.S. 341, 349 (1976) ("Federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies."); *Connick v. Meyers*, 461 U.S. 138, 143 (1983) ("[G]overnment offices could not function if every employment decision became a constitutional matter."). By asking that we review virtually every significant employment decision for absolute political neutrality, plaintiffs essentially ask that we constitutionalize civil service and then preside over the system. This would be an unprecedented intrusion into the political affairs of the states and other branches of federal government. In the absence of a

clear indication from the Supreme Court, we will not take such a large step.

In sum, we believe *DeLong*'s analysis provides the appropriate inquiry in patronage cases involving practices other than the actual or threatened dismissal from employment. In the political world in which democratic institutions exist, courts should not interfere unless compelling reasons exist for doing so. Banning political considerations from all public service employment decisions, even if practical, would diminish the political will of the voters, insert courts into disputes between political factions, and stifle the ability of elected officials to govern. These public policy questions, rife with serious concerns over federalism and—in the case of federal employment— separation of powers, are best left in the political arena.[4]

Having determined the appropriate analysis to apply to plaintiffs' claims, we must next determine whether, under that analysis, the district court properly dismissed those claims. Under Fed.R.Civ.P. 12(b)(6), a court may not dismiss a complaint unless it appears beyond doubt that the plaintiff can prove no set of facts to support his claims that would entitle him to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In making this determination, a court must resolve all reasonable inferences in the plaintiff's favor. *See Hanrahan v. Lane*, 747 F.2d 1137, 1139 (7th Cir. 1984). In light of the appropriate analysis and the stringent standards for Rule 12(b)(6) dismissals, we reverse the district court's decision to dismiss Standefer's, O'Brien's, Rutan's, and

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[4] All this is not to say that retaliatory harassment falling short of actual or constructive discharge is not actionable. We held in *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982), that even an act of retaliation as trivial as failing to hold a birthday party for a public employee could be actionable when intended to punish her for exercising her free speech rights. However, acts of retaliation must be distinguished from favored treatment of political supporters that has the incidental effect of making a nonsupporter no better off.

Taylor's claims, and affirm the decision to dismiss Moore's claim.

Moore alleges that he applied for jobs that were awarded to less qualified but politically favored persons. The district court correctly dismissed this claim. As we explained above, rejecting an employment application does not impose a hardship upon an employee comparable to the loss of job. *See Wygant v. Jackson Board of Education*, 476 U.S. 267 (1984) (plurality opinion); *see also Avery v. Jennings*, 786 F.2d 233 (6th Cir. 1986).[5] Failing to obtain a particular position disappoints, but no more so than the plaintiff's failing to obtain employment in *Avery*, 786 F.2d at 36-37, the contractor's failing to obtain a contract in *LaFalce*, 712 F.2d at 294, or the independent contractors losing their working relationships with the state in *Horn v. Kean*, 796 F.2d at 674-75, and *Sweeney*, 669 F.2d at 545-46. Any burden imposed on an employment applicant does not outweigh the significant intrusion into state government required to remedy such a claim. While the wisdom of patronage hiring

[5] In *Avery v. Jennings*, 786 F.2d 233 (6th Cir. 1986), the Sixth Circuit indicated in dictum that hiring decisions based "solely" on party affiliation would violate the First Amendment. When faced with that dictum a two-member majority of another Sixth Circuit panel "reluctantly" reversed a district court's decision to dismiss a complaint in which a plaintiff alleged that a hiring decision was based "solely" on political considerations. *Messer v. Curci*, No. 85-5626 (6th Cir. Dec. 2, 1986) (available on Lexis), *vacated and rehearing en banc granted*, No. 85-5626 (6th Cir. Jan. 21, 1987) (available on Lexis). The majority believed the complaint failed to state a claim but decided for prudential reasons to follow *Avery*'s dictum. The third member of the panel dissented on the ground that the panel was not bound by the dictum and that the complaint failed to state a claim.
We agree with the panel in *Messer v. Curci* that it should not matter whether the complaint alleges that patronage was the "sole reason" or a "motivating reason." We do not believe the fact that Democrats filled 10 out of 422 available slots was dispositive on the issue of whether political factors may be taken into account by a public employer. *Avery* added this

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practices is certainly open to debate, the validity of such practices is something more appropriately addressed to the legislature than the courts.

Rutan's and Taylor's claims are more problematic than an employment applicant's claims. Rutan alleges that she has been denied promotions that went to less qualified but politically favored persons. Taylor alleges that he has been denied a promotion that went to a less qualified but politically favored person. He also alleges that he was denied a transfer because he did not have the support of the Republican Party chairmen in Fulton and Schuyler Counties. Although a close question, we believe the district court erred in dismissing those claims.

If we were reviewing this case after trial and the facts pled in the complaint constituted the only evidence in the record, we would affirm the district court's judgment. As discussed above, merely failing to transfer or promote an employee is significantly less coercive or disruptive than discharging an employee. However, dismissing a complaint under Fed.R.Civ.P. 12(b)(6) is proper only if it appears beyond doubt that a plaintiff can prove no facts to support his claim. While it may be highly unlikely that a person who is merely denied a transfer or promotion can prove that the decision was the substantial equivalent of a dismissal, we cannot make this determination as a matter of law based on the minimal facts contained in the complaint. We are particularly reluc-

[5] *continued*

dictum to reconcile its holding with the Supreme Court's holdings in *Keyishian* and *Wiemann* invalidating state laws banning Communists and other "subversives" from employment. These cases, however, are not controlling in the patronage area. Under the *Branti* and *Elrod* balancing test a completely different set of factors are involved in patronage cases.

tant to scrutinize the pleadings under freshly articulated standards. Whether a particular employment action is equivalent to a dismissal rests upon each case's facts and circumstances. *Cf. Clark v. Marsh*, 665 F.2d 1168 (D.C. Cir. 1981) (upholding finding of constructive discharge when aggravating circumstances led an employee to retire after being denied a promotion). If Rutan and Taylor can assert that some special circumstances present in their cases would have led a reasonable person to quit, they should be permitted to pursue any such claim.

We also note that both Rutan and Taylor appear to have remained in their positions after the challenged employment decision. This is certainly relevant in determining the severity of the impact of the challenged patronage decision but does not as a matter of law prevent Rutan and Taylor from proceeding with their claims. We agree with the position implicit in *DeLong* that a first amendment violation occurs when the burden placed upon a particular employee is substantially equivalent to a discharge. An employee could stay on the job and withstand very difficult circumstances that might cause others similarly situated to quit. Financial circumstances may not allow the person the luxury of resigning before finding other employment. That circumstances prevent an employee from resigning does not decrease the burden the employer has, in fact, placed upon him.

We emphasize that the issue is not whether partisan reasons entered into a particular employment decision. Rather, the issue is whether a partisan decision imposed such a burden upon a particular employee that it would have led a reasonable employee to quit. There are a wide variety of employment decisions made every day that result in disappointment to employees. For every person promoted there are several others who wish they had been. Federal court is not intended to be the final arbiter for every real or imagined slight claimed by disappointed employees. It is only when a

particular patronage practice could *reasonably* be thought to be the substantial equivalent of a dismissal that such a practice violates the First Amendment.

Standefer's and O'Brien's claims are more straightforward. Standefer alleges that he was laid off from a "temporary position" at the state garage in Springfield along with five other employees. The five other employees, who had the Republican Party's support were offered other state jobs. Standefer was not. Resolving all reasonable inferences from these facts in Standefer's favor, these allegations may support a claim that a public employer conditioned Standefer's continued employment with the State upon Standefer's political affiliation. This is the type of conduct found constitutionally impermissible in *Branti* and *Elrod*.

This is not to say that a laid-off employee is automatically entitled to be considered for other positions with the State, or even his old position, without patronage considerations being taken into account. Failing to rehire after layoff does not in and of itself violate the rule enunciated in *Elrod* and *Branti*. Many laid-off employees will stand essentially in the position of new job applicants when they seek a position. But not all employees will be in that position. If a formal or informal system exists for placing employees into other positions, that system must not include partisan political considerations that cause an employee to lose his employment with the state.

On remand, the court must consider all the facts and circumstances of Standefer's case with the ultimate inquiry being whether a politically motived failure to place Standefer in another position was the substantial equivalent of a termination from employment. In making this determination, we believe that several facts deserve special consideration. The district court should consider: whether the employment relationship was considered to be "temporary" rather than "permanent"; whether the "layoff" was merely the end of a

temporary position or whether it was a true layoff; whether employees had reasonable expectations of placement into other job positions upon layoff; whether the previous employment with the State was simply a minor factor considered with many others in an *ad hoc* process or whether it was essentially determinative in being placed in the new position; and, whether there was a substantial time lapse between the layoff and placement of other employees or whether the placement into other positions was made contemporaneously with the layoff. Although we have listed these facts, we do not purport to delineate every possible factor or the weight given to each factor. Rather, as stated above, the court must look at all the facts and circumstances with an eye towards ultimately determining whether failing to place Standefer in a position after layoff was substantially equivalent to firing him.

O'Brien alleges that he was laid off from a position at the Lincoln Development Center. He does not allege that he had any specific right to recall. But he does allege that, under the Center's policies, he could be recalled within two years, and if recalled, there would be no break in his seniority and other benefits. "Several months" after being laid off he received a position with the Department of Corrections in which he had no accrued seniority or benefits. In February of 1985 (apparently after he was working at the Department of Corrections), he was told by an administrator at the Center that he would be rehired if the Center received an exception to the "Hiring freeze." The Governor's office denied the request for an exception.

Laying off an employee suspends the employee's working relationship with an employer but does not usually terminate the relationship. Absent indications that an employee's layoff is "permanent," a layoff will typically involve some formal or informal expectation of being placed back in the position if, within some specified or reasonable time period,

the job becomes open once again. A person who has ordered his life around a particular job, built up experience and seniority in the position, and has a reasonable expectation of being recalled to that position stands in far different position than an employment applicant. After a layoff, a recall to the same job conditioned upon an employee's political affiliation is the type of inherently coercive conduct that *Branti* and *Elrod* found to violate the First Amendment.

There are some factors in O'Brien's case that take it beyond a straight failure to recall from layoff case. First, O'Brien does not allege that there was a general recall that he was left out of because he was not a Republican supporter. In fact, he does not even allege that his position was filled by anyone within the two-year recall period. Absent these facts he may have a difficult time proving his claims. Nonetheless, the allegation in the complaint that, absent political considerations, he would have been granted an "exception" to the "hiring freeze," and thus been reinstated into his job, is sufficient to state a claim for relief.

Second, O'Brien apparently held a position with the Corrections Department at the time he was denied an exception to the "hiring freeze." Thus, the alleged patronage system did not deny him employment altogether. Nonetheless, as discussed earlier, the fact that a person is on the state payroll does not automatically render the claim insufficient as a matter of law.

In sum, we affirm the district court's decision dismissing Moore's claim. We reverse the district court's decision dis-

missing the other plaintiffs' employment claims and remand for further proceedings consistent with this opinion.[6]

D. *Voter Challenges to Patronage Practices—Standing.*

Besides challenging the alleged patronage system as employees, plaintiffs, as voters, also claim that the patronage system deprived them of "equal access and effectiveness of elections." Plaintiffs allege that the patronage system gives Governor Thompson and his supporters a significant advantage over their opposition in elections. The district court never reached the merits of this claim on the ground that the plaintiffs lacked standing. We agree.

In *Shakman v. Dunne*, 829 F.2d 1387 (7th Cir. 1987), *cert. denied*, 108 S.Ct. 1026 (1988), this circuit analyzed the standing requirement as applied to claims by candidates and voters challenging patronage hiring practices in Cook County, Illinois. In *Shakman*, the candidates and voters claimed that patronage hiring had the "purpose and effect" of giving incumbent Democratic officials a significant advantage in communicating with the electorate. The court rejected plaintiffs' claims, holding that the candidates and voters had no standing to challenge patronage hiring. In finding that the plaintiffs lacked standing, the court reasoned that the chain of causation between the challenged governmental activity and the alleged injury was too tenuous:

> [W]e find the line of causation between the appellant's activity and the appellee's asserted injury to be particularly attenuated. . . . [T]he line of causation depends upon countless individual decisions. Moreover, those countless individual decisions must depend upon . . . countless individual political assessments that those who are in power will stay in power. It is not the hiring policy itself which creates any advantage for the incumbents. Any other candidate is entirely free to assert that, if elected, he will follow the same policy. Any advantage obtained by the incumbent is obtained only if the potential workers make an independent evaluation that the incumbent, and not the opposition, will win. The plaintiffs will be at a disadvange if—and only if—a significant number of individuals seeking political job opportunities determines the 'ins' will remain the 'ins.'

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[6] On remand the district court should also "as soon as practicable" consider whether the individual employees' claims may properly be brought as a class action. Fed.R.Civ.P. 23(c). In view of the individualized determinations necessary to resolve the claims, the district court should carefully scrutinize the claims before deciding to certify any class. *See generally General Telephone Co. v. Falcon*, 457 U.S. 147 (1982).
We also note that defendants have argued on appeal that they are entitled to qualified immunity from damages. Such a request is more appropriately addressed to the district court on remand.

Id. at 1397. The court also noted that so many factors, many not even capable of articulation, determine a person's political activity that the plaintiffs could not say that their alleged injuries were "fairly traceable" to the defendant. *Id.; see also Winpisinger v. Watson*, 628 F.2d 133, 139 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980) (no standing for supporters of President Carter's primary opponent to challenge Carter Administration award of 275,000 census jobs allegedly conferred on a political patronage basis).

Here, plaintiffs' standing argument is no different from that rejected in *Shakman*. In fact, plaintiffs made clear that their claims are virtually the same claims that the district court held sufficient to confer standing in *Shakman* (which was reversed after oral argument in this case). *See Shakman*, 481 F.Supp. 1315 (N.D. Ill. 1979), *rev'd in relevant part*, 829 F.2d 1387 (7th Cir. 1987). Like the plaintiffs in *Shakman*, plaintiffs contend that patronage has created an advantage in favor of the incumbents.

This does not confer standing on voters. The causal link between "loss" in their votes' impact and the challenged actions is too tenuous. Indeed, plaintiffs' statewide challenge

presents a more tenuous causal relationship than the challenge mounted by voters *and* candidates in *Shakman* to patronage hiring in a single county. Because the injury asserted in the complaint is not fairly traceable to the challenged action, the district court properly dismissed plaintiffs' claims as voters for lack of standing.

Each side shall bear its own costs.

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED.

CUDAHY, *Circuit Judge*, concurring in part and dissenting in part:

With respect to the patronage hiring claim of James Moore, I agree with the result reached by the majority though not necessarily with all the reasoning. It seems to me that removing politics from the dispensation of government jobs is too daunting a task even for such all-purpose problem-solvers as the federal courts. At least the task should not be undertaken without some clearer signal from the Supreme Court. How to square this conclusion with the extensive first amendment jurisprudence which has grown up around political *discharges* is an even more daunting challenge, although *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984), may point the way— at least for the time being. Patronage hiring practices are of great antiquity. There may be *some* good in them in *some* circumstances but, most importantly, rooting them out is something the federal courts could not accomplish without incurring straggering and, I should think, clearly disproprotionate costs. The patronage hiring practices involved here seem unvarnished and redolent of another era. They could, however, be dealt with by a properly designed civil service system. This is not a job for the federal courts—*yet*.

With respect to unfavorable personnel actions falling short of discharge involving existing employees, I agree with Judge Ripple and would rely on his persuasive partial dissent to the original panel opinion, 848 F.2d 1396, 1412 (7th Cir. 1988), as well as on his separate opinion here. It strikes me also as unrealistic to require plaintiffs to show that they were treated badly enough to quit, but for some reason did not. I would also follow *Bennis v. Gable*, 823 F.2d 723 (3d Cir. 1987) (extending *Elrod* to any "disciplinary action" imposed for the exercise of first amendment rights), rather than *DeLong v. United States*, 621 F.2d 618 (4th Cir. 1980) (limiting *Elrod* to actions "substantially equivalent to dismissal"). We are already deeply into the business of protecting the first amendment rights of those who are already public employees and here I think we should follow the logic of our cases rather than attempt to draw the line quite unrealistically at constructive discharges.

For all these reasons I respectfully dissent to the extent indicated.

RIPPLE, *Circuit Judge*, concurring in part and dissenting in part. In this bobtailed[1] en banc proceeding, the majority has filed essentially the same opinion that was filed by the majority in the original panel's consideration of this matter. *Rutan v. Republican Party of Illinois*, 848 F.2d 1396 (7th Cir. 1988). I shall rely therefore on the separate opinion I filed when the case was before the panel. *Id.* at 1412. I note only that, with the Second Circuit's decision in *Lieberman v. Reisman*, 857 F.2d 896 (2d Cir. 1988), the division among the circuits appears to deepen. Apparently, government workers in Hartford, New York, Philadelphia, Pittsburgh,

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1 *See North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 615 (1975) (Blackmun, J., dissenting).

and Atlanta can expect protection when a local politician makes life uncomfortable because they do not knuckle under to his political will—even though politics has nothing to do with their jobs. In Chicago, and perhaps Richmond, the watchword is "politics as usual."

The need for Supreme Court review of this important question is evident. American citizens serving their county in state and local government ought not have their legal protection depend on the accident of where Congress decided to draw the administrative line separating one circuit from another. Review on certiorari is particularly appropriate in this case because the majority's reasoning depends, to a great extent, on its disagreement with the governing precedent of the Supreme Court. *See* Supreme Court Rule 17.1(c) (certiroari appropriate "[w]hen . . . a federal court of appeals . . . has decided a federal question in a way in conflict with applicable decisions of this Court"). It may be that the majority has perceived correctly the winds of change. But change must come from the Supreme Court, not a regional court of appeals. For us, stare decisis must be the governing principle.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

In the

United States Court of Appeals

For the Seventh Circuit

No. 86-2073
CYNTHIA RUTAN, et al.,

Plaintiffs-Appellants,

v.

REPUBLICAN PARTY OF ILLINOIS, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of Illinois, Danville Division
No. 85-2369—**Harold A. Baker**, *Chief Judge*

ARGUED APRIL 7, 1987—DECIDED JUNE 8, 1988

Before COFFEY, RIPPLE, and MANION, *Circuit Judges*.

MANION, *Circuit Judge*. Plaintiffs appeal the district court's dismissal of their complaint challenging a public employer's use of political considerations in hiring, rehiring, transferring, and promoting employees. *See Rutan v. Republican Party of Illinois*, 641 F.Supp. 249 (C.D. Ill. 1986). We affirm in party, reverse in party, and remand.

I.
NATURE OF THE CASE

This basis of plantiffs' complaint is that Governor James R. Thompson of Illinois, the Republican Party of Illinois, and various state and Republican Party officials use political considerations in hiring, rehiring from layoffs, transferring, and promoting state employees under Governor Thompson's jurisdiction. Because we are reviewing the district court's dismissal of the complaint for failure to state a claim upon which relief can be granted, we take the allegations in the complaint as true. *See LaSalle National Bank of Chicago v. County of DuPage*, 777 F.2d 377, 379 (7th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986).

According to the complaint, approximately 60,000 state employees work in more than fifty "departments, boards and commissions under the jurisdiction" of Governor Thompson. On November 12, 1980, Governor Thompson issued an executive order "which requires his personal approval or that of a designee before any individual may be hired or promoted...." The executive order, which is attached to the complaint, states:

> HIRING FREEZE
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> Effective at the close of business today, November 12, 1980, no agency, department, bureau, board or commission subject to the control or direction of the Governor shall hire any employee, fill any vacancy, create any new position or take any other action which will result in increases, or the maintenance of present levels, in State employment, including personal service contracts. *All hiring is frozen*. There will be *no* exceptions to this order without my express permission after submission of appropriate requests to my office.

(Emphasis in original.) Governor Thompson has assigned power over significant employment decisions to the "Governor's Office of Personnel." Plaintiffs contend that the employment decisions made by the Governor's Office of Personnel are:

> ...substantially motivated by political considerations. Such political considerations include whether the individual under consideration is Republican or a relative or friend of a Republican, is sponsored by an influential Republican, is a financial supporter of the Republican Party or an influential Republican, is a friend or supporter of Defendant Thompson or is sponsored by those who are friends or supporters of Defendant Thompson or is sponsored by a member of the Illinois General Assembly who is deemed to be a friend or supporter of Defendant Thompson.

This patronage employment system, plaintiffs claim, creates a significant political advantage "in favor of the 'ins,' i.e., Defendant James Thompson and his political allies, and against the 'outs,' i.e., those who may wish to challenge in elections."

The defendants are Governor Thompson, the Illinois Republican Party, seven current or former state officials and two Republican Party officials. Plaintiffs sued two of the state officials as class representatives, one as a representative of all "Directors, Heads or Chief Executive Officers . . . since February 1, 1981" of state agencies under the Governor's jurisdiction and the other as a representative of all persons who acted as "liaisons" between those state agencies and the Governor's Office of Personnel. Plaintiffs sued the Republican Party officials as representatives of the class of "all Republican State Central Committee and County Central Committee officials and members . . . since February 1, 1981."

Plaintiffs brought this action both as individuals and as representatives of six different classes. These classes are: (1) voters; (2) taxpayers; (3) politically unacceptable employees denied promotions; (4) politically unacceptable employees denied transfers; (5) politically unacceptable employees who have not been rehired after being laid off; and (6) politically unacceptable employment applicants who have applied for but not received a job.

Plaintiff Cynthia Rutan has worked for the Department of Rehabilitative Services since 1974. She has neither been active in the Republican Party nor supported Republican candidates. Since 1981, Rutan has applied for promotion into supervisory positions in the Department of Rehabilitative Services. Defendants allegedly filled each of these supervisory positions with someone less qualified but "favored on a political basis by the Governor's Office of Personnel." Rutan sued on her own behalf and as a class representative of those denied promotions as a result of the patronage system.

Plaintiff Franklin Taylor works for the Department of Transportation. He does not support the Republican Party. In 1983, Taylor applied for a promotion. A less qualified person, whom the Fulton County Republican Party supported, received the promotion. Taylor subsequently requested a transfer to a different county. Taylor was allegedly advised that he was not transferred because the Republican Party Chairmen of Fulton and Schuyler Counties opposed the transfer. He sued on his own behalf and as a class representative of those denied promotions and transfers as a result of the patronage system.

Plaintiff Ricky Standefer was hired in a temporary position at the State Garage in Springfield in May, 1984. In November of that year, he and five other employees were laid off. The five other employees, who had Republican Party support, were offered other state jobs. Standefer, who

had voted in the Democratic Party primary, was not. He sued on his own behalf and as a class representative of those who, as a result of the patronage system, have not been rehired after being laid off.

Plaintiff Dan O'Brien was employed as a "Dietary Manager I" at the Department of Mental Health and Developmental Disabilities' Lincoln Development Center. O'Brien has voted only once in a primary, and that was in a Democratic Party primary. O'Brien was laid off on April 5, 1983. Under the "rules of the Department of Central management Services," a laid off employee can be recalled within two years. If recalled, the employee's benefits continue and he does not lose seniority. "[R]ecall within that time period means no loss of seniority and continuation of other employment benefits." In December of 1984, an administrator at the Lincoln Development Center told O'Brien that he would be recalled. The administrator stated, however, that he was waiting to receive the necessary exception to Governor Thompson's hiring freeze. In February of 1985, O'Brien was told that the Governor's Office had denied him an exception to the freeze. "Several months" after being laid off, O'Brien attempted to and "ultimately" did receive employment with the Department of Corrections. He obtained this job after obtaining the support of the Chairman of the Logan County Republican Party. This job paid less money than his previous job. O'Brien sued on his own behalf and as a class representative of those who, as a result of the patronage system, have not been rehired after being laid off.

Plaintiff James Moore "has sought employment with the State of Illinois particularly with the Department of Corrections" since 1978. In 1980, Moore received a letter from a Republican State representative informing him that he would have to "receive the endorsement of the Republican Party in Pope County before I can refer your name to the Governor's office." Moore alleges that while he was attempt-

ing to obtain a position with the State, "the son of the current Chairman of the Pope County Republican Central Committee, . . . the son-in-law of the Vice-Chairman and precinct committeewoman of the Pope County Republican Central Committee," and a Republican precinct committeeman were hired by the State in positions for which Moore was qualified. Moore sued on his own behalf and on behalf of all those denied employment as a result of the patronage system.

Plaintiffs also brought claims as voters and taxpayers. They claimed to represent a class of voters "who are entitled to cast their votes and use the election process to change and influence the direction of government and who have an interest in having a voice in government of equal effectiveness with other voters." They also claimed to represent a class of taxpayers who "are entitled to have monies provided by the taxpayers of Illinois spent only for State purposes and not spent on the operation and maintenance of a State political patronage system." As voters, plantiffs claimed that the patronage system has diminished the value of their votes, thus denying them "a voice in government of equal effectiveness with other voters." As taxpayers, plaintiffs claimed to have been deprived of tax "monies . . . which have been expended for the support of the patronage system and not for a governmental purpose."

Plaintiffs sought relief under numerous federal and state law theories. *See Rutan*, 641 F.Supp. at 252-59. On appeal we are concerned with two: (1) their claims as employees or potential employees that the patronage system violated their rights under the First Amendment as applied to the states through the Fourteenth Amendment; and (2) their claims as voters that the patronage employment system violated the Fourteenth Amendment by denying them equal access and

effectiveness in elections.[1] In their prayer for relief, plaintiffs sought over a billion dollars in damages and requested that the district court transfer the Governor's control over the state employment system to a federal receiver.

Defendants moved to dismiss the complaint under Fed.R.Civ.P. 12(b)(6) on the ground that it failed to state a claim for relief. The district court granted defendants' motion. *See Rutan*, 641 F.Supp. 249 (C.D. Ill. 1986). This appeal ensued.

II.
ANALYSIS

A. *The District Court's Nonconsideration Of The Class Action Question.*

Before addressing the substantive issues raised on this appeal, we must first address the district court's failure to consider whether plaintiffs may properly bring this case as a class action. The district court dismissed the complaint under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted but did not first consider whether the

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1 In the portion of their brief denominated "Statement of Questions," plaintiffs did purport to raise an equal protection claim in their capacities as employees and employment applicants. Plaintiffs' employment claims, however, rise and fall on their First Amendment claims because the arguments in the brief are argued solely under the First Amendment. Whatever its merits, plaintiffs' failure to argue their equal protection claim waived that claim. *See Sanchez v. Miller*, 792 F.2d 694, 703 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 933 (1987).

Plaintiffs also appeal the district court's dismissal of their state law claims brought as taxpayers for lack of pendent jurisdiction. Because we remand the employment claims of four plaintiffs the district court should consider on remand whether it should exercise pendent jurisdiction over those state law claims. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). Any consideration of those claims should also, as with all claims brought in federal court, analyze whether plaintiffs have standing to bring those claims.

action may be properly brought as a class action. This violates Fed.R.Civ.P. 23(c)(1), which requires the district court to address the issue of class certification "as soon as practicable." *See Hickey v. Duffy*, 827 F.2d 234, 237 (7th Cir. 1987); *Bennett v. Tucker*, 827 F.2d 63, 66-67 (7th Cir. 1987). The district court's failure to address the class action issue does not deprive us of jurisdiction under 28 U.S.C. § 1291. The district court's order dismissed the suit in its entirety, leaving nothing to be decided in that court. *See Hickey*, 827 F.2d at 238; *see also Gomez v. Illinois State Board of Education*, 811 F.2d 1030, 1034 n.1 (7th Cir. 1987). Thus even though the district court should have addressed the class action issue, its failure to do so does not destroy the finality of its decision.

The failure to address the class action issue, however, does limit the scope of our judgment. Because no class of plaintiffs or defendants was certified, only the named plaintiffs and named defendants are before this court. *See Hickey*, 827 F.2d at 238 (citing *Board of School Commissioners v. Jacobs*, 420 U.S. 128, 130 (1975)). Therefore, we treat plaintiffs' claims as being brought solely by the named plaintiffs against the named defendants. *See Roberts v. American Airlines, Inc.*, 526 F.2d 757, 762-63 (7th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976); *see also Phara v. Smith*, 621 F.2d 656, 663-64 (5th Cir.), *rehearing granted in party and modified on other grounds*, 625 F.2d 1226 (5th Cir. 1980) (per curiam).

B. *Patronage Employment Claims*

Plaintiffs' employment claims challenge the validity of a longstanding feature of the American political landscape. They each claim that they did not receive some favorable employment decision because the defendants' employment decisions were substantially motivated by political considerations. Plaintiffs argue that the defendants placed an unconstitutional burden on their freedom of belief and association guaranteed by the First Amendment by relying

upon political considerations in making employment decisions. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate.") On the other hand, defendants argue that the district court properly dismissed plaintiffs' claims because the First Amendment does not require absolute political neutrality by a public employer in making employment decisions. According to defendants public employer patronage practices violate the First Amendment only if an employee whose party affiliation is not a necessary requirement for his job is discharged or threatened with discharge. Thus, we must resolve two issues in addressing these claims: (1) whether, and to what extent, a public employer may take political affiliation into account in making employment decisions; and (2) whether, under the appropriate substantive rule, the district court properly dismissed plaintiffs' claims.

For years, the hiring and retention of public employees rested exclusively within the realm of legislative and executive discretion. A public employee's challenge to a particular employment practice that affected his free expression was met with Justice Holmes' famous pronouncement as a member of the Supreme Judicial Court of Massachusetts that, "[a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892); *see generally Connick v. Myers*, 461 U.S. 138, 143-44 (1983). The latter half of this century has seen a broad expansion of the rights of employees and a corresponding diminution of the discretion exercised by the legislative and executive branches of government. *See Connick*, 461 U.S. at 143-47. The Supreme Court has struck down state laws that required public employees to take an oath denying past or present affiliation with the Communist Party, or other "subversive" organizations, *Wieman v. Updegraff*, 344 U.S. 183 (1952), as well as laws that barred members of the Com-

munist Party and other "subversive" organizations from state employment, *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). Other cases have firmly established that a public employee may not be discharged for speaking out on matters of public concern. *See, e.g., Pickering v. Board of Education*, 391 U.S. 563 (1968). Moreover, retribution short of discharge that is directed at an employee's speech has also been held to violate the First Amendment. *See Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982).

Although broad, public employees' First Amendment rights are not absolute. The First Amendment requires an employee's interest in free expression to be balanced against the legitimate interests of the state served by the challenged practice. *See Pickering*, 391 U.S. at 568; *cf. Buckley v. Valeo*, 424 U.S. 1 (1976). Thus, discharging an employee whose complaints about the workplace disrupt the workplace and undermine a supervisor's authority does not violate the First Amendment. *See Connick*, 461 U.S. at 150-54 (1983). Similarly, public employer work rules that are legitimately related to the workplace's effective functioning and "not aimed at particular parties, groups or points of view" do not violate the First Amendment even though the rules may negatively affect employees' speech or political association. *See Civil Service Comm'n v. Nat'l Assoc. of Letter Carriers*, 413 U.S. 548, 564 (1973) (upholding Hatch Act restrictions on political activities by federal employees); *cf. Bart*, 677 F.2d at 624-25 (upholding rule requiring employee-candidate to take leave of absence while campaigning).

There are few areas where the balancing of interests under the First Amendment analysis is more sharply debated, or more uncertain, than the area of political patronage in employment. The Supreme Court first addressed the validity of patronage employment practices in *Elrod v. Burns*, 427 U.S. 347 (1976). In *Elrod*, the newly-elected sheriff of Cook County, Illinois, a Democrat, succeeded a Republican in that

office. The new sheriff discharged some of the incumbent employees and threatened to discharge others because they were not affiliated with or sponsored by the Democratic Party. A divided Supreme Court held that this practice violated the First Amendment.

Drawing heavily upon *Keyishian* and *Pickering*, a plurality of three justices stated that the patronage dismissals unnecessarily restricted political belief and association and that "any contribution of patronage dismissals to the democratic process does not suffice to override their severe encroachment on First Amendment freedoms." 427 U.S. at 372-73 (plurality). Although generally unimpressed with patronage practices, the plurality did limit its consideration of the issues to patronage dismissals and not to other patronage practices. *Id.* at 353 (plurality). Moreover, Justice Stewart's concurrence (in which Justice Blackmun joined) expressly limited the Court's holding to cases where, solely on the basis of political belief, a nonpolicymaking, nonconfidential employee is discharged or threatened with discharge from a job that he is satisfactorily performing. 427 U.S. at 375 (Stewart, J., concurring).

The Court next addressed patronage employment in *Branti v. Finkel*, 445 U.S. 507 (1980), and slightly modified its holding in *Elrod*. In *Branti*, two Republican assistant public defenders sued after a newly-elected Democratic public defender threatened them with discharge. The Court ruled for the assistants, holding that a public employer cannot discharge an employee based on party affiliation unless "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518. Again, the Court expressly limited its consideration of the issues to patronage dismissals. *Id.* at 513 n.7.

In light of the limited nature of the Supreme Court's holdings in *Branti* and *Elrod*, the courts of appeals have been generally hesitant to extend the rule enunciated in those

cases. In *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984), this circuit affirmed the dismissal of a complaint filed by a contractor who brought suit alleging that a mayor violated the contractor's First Amendment rights by rejecting the contractor's bid for a city contract because the contractor did not support the mayor politically. In reaching its conclusion, the *LaFalce* court balanced the interference with political expression caused by the patronage practice against "the consequences of trying to prevent [the interference] through an interpretation of the Constitution." *Id.* at 293-94.

The court first found that a contractor's loss of a particular bid was less disruptive than an employee's loss of a job; a contractor still has other potential contracts to bid on. Moreover, the interference was not likely to affect many businesses, given that most stay on good terms with all major political parties. *Id.* at 294.

The court then determined that the costs of attempting to interfere with the patronage practices outweighed any interference with political affiliations.

> [A]gainst the uncertain benefits of such a rule in promoting the values of the First Amendment must be set the unknown but potentially large costs. To attempt to purge government of politics to the extent implied by an effort to banish partisan influences from public contracting will strike some as idealistic, others as quixotic, still others as undemocratic, but all as formidable. Patronage in one form or another has long been a vital force in American politics. Civil service laws, . . . requiring public contracts to be awarded to the low bidder, laws regulating the financing of political campaigns, and decisions such as *Elrod* and *Branti* have reduced the role of patronage in politics but have not eliminated it entirely. The desirability of reducing it still further raises

> profound questions of political science that exceed judicial competence to answer . . .

Id. The court also expressed concern that public officials would be subject to suit by disappointed bidders each time the city awarded a bid. Finally, the court expressed reluctance to "take so big a step in the face of the Supreme Court's apparent desire to contain the principle of *Elrod* and *Branti*." *Id.* at 294-95; *see also Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986) (en banc) (partisan dismissal of motor vehicle agents who were independent contractors, not employees, held not to violate First Amendment); *Sweeney v. Bond*, 669 F.2d 542 (8th Cir.) (partisan dismissals of "fee agents" who were independent contractors held not to violate First Amendment), *cert. denied*, 459 U.S. 878 (1982).

In the employment context, the courts of appeals have extended *Branti* and *Elrod* beyond outright discharges and threats of discharges. For example, the courts have held that a partisan decision not to allow an employee to retain his job after the employee's "official" term of employment expires may violate the First Amendment. *See, e.g., McConnell v. Adams*, 829 F.2d 1319 (4th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3789 (U.S. May 17, 1988) (No. 87-1424) *Cheveras Pachecho v. Rivera Gonzalez*, 809 F.2d 125 (1st Cir. 1987); *Furlong v. Gudknecht*, 808 F.2d 233 (3rd Cir. 1986); *McBee v. Jim Hogg County*, 730 F.2d 1009 (5th Cir. 1984) (en banc). An open question remains, however, over whether burdens imposed by a patronage system rise to the level of a constitutional violation in situations that are not equivalent to the loss of employment.

In *Delong v. United States*, 621 F.2d 618 (4th Cir. 1980), the Fourth Circuit limited employees' challenges to patronage practices to those practices that "can be determined to be the substantial equivalent of dismissal." *Id.* at 624. In that case, the plaintiff, a Republican, challenged his transfer and reassignment from his position as State Director of the Farmers

Home Administration in Maine to a position as a project assistant in Washington, D.C. The plaintiff had been transferred and reassigned as part of a policy of the Secretary of Agriculture to replace Republican state directors with Democrats.

The district court granted the government summary judgment on the ground that plaintiff's position as a state director was a "policymaking" position. On appeal, the Fourth Circuit reversed and remanded the case to be considered under *Branti*'s newly articulated test that "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Delong*, 621 F.2d at 622. In so holding, the court rejected the government's argument that the patronage reassignment and transfer of an employee protected under *Branti* and *Elrod* could never constitute an unconstitutional burden upon an employee's beliefs and associations. The court did, however, limit such challenges to those patronage practices which, while not an actual or threatened discharge, could be considered tantamount to a dismissal. *Id.* at 623-24. In pertinent part the court reasoned:

> Dismissal or the threat of dismissal for political patronage reasons is of course the ultimate means of achieving by indirection the impermissible result of a direct command to a government employee to cease exercising protected rights of free political association and speech. This is *Elrod*'s and *Branti*'s specific, narrow application of the principle. We believe that when the principle is applied to patronage practices other than dismissal it is rightly confined to those that can be determined to be the substantial equivalent of dismissal.
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> In applying the principle, so limited, to the actual or threatened reassignment or transfer of a government employee, the issue thus becomes whether the specific reassignment or transfer does in fact impose upon the employee such a Hobson's choice between resignation and surrender of protected rights as to be tantamount

> to outright dismissal. This much and no more, we conclude, is a necessary implication from the broader principle drawn upon in *Elrod* .... It is obvious that not every reassignment or transfer can fairly be throught to have this quality. It is equally obvious that in practical terms some might.

Id.

The "substantial equivalent of dismissal" standard focuses on the same question presented in constructive discharge cases, that is, whether a particular patronage decision would lead a reasonable person in the plaintiff's position to feel compelled to leave his job. *See, e.g., Parrett v. City of Connersville*, 737 F.2d 690 (7th Cir. 1984), *cert. dismissed*, 469 U.S. 1145 (1985). In the course of most, if not all, persons' employment there are a wide variety of disappointments and possibly some injustices. Most of these are normal incidents of employment that could not be said to lead a reasonable person to quit. *See Bristow v. The Daily Press, Inc.*, 770 F.2d 1251, 1256 n.4 (4th Cir. 1985) (denial of promotion in and of itself cannot constitute a constructive discharge), *cert. denied*, 475 U.S. 1082 (1986); *Schaulis v. CTB/McGraw-Hill, Inc.*, 496 F.Supp. 666 (N.D. Cal. 1980) ("An employer has not effected a constructive discharge merely because an employee believes that she has . . . limited opportunities for advancement . . . . "). However, whether a particular action can be viewed as "substantially equivalent to a dismissal" (or a constructive discharge) is not subject to hard and fast rules. All the circumstances of a case must be taken into account.[2]

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[2] Many constructive discharge cases in the employment discrimination area have required that the employer specifically intend for an employee to resign. *See, e.g., Bristow*, 770 F.2d 1251, 1255 (4th Cir. 1985) (ADEA). This appears to be an open question in this circuit. *See Henn v. National Geographic Society*, 819 F.2d 824, 829 (7th Cir.) (ADEA), *cert. denied*, 108 S.Ct. 454 (1987). *Delong* does not place any such requirements in patronage cases, nor do we think it would be appropriate to do so. *Branti, Elrod*, and *Delong* all focus on the burden a patronage system places on an employee, not on the employer's intent to impose the burden.

Being placed in a sinecure may be some employees' idea of the ultimate job. For other employees, enforced idleness may be a humiliating experience as well as one that may permanently impair their professional skills. *See Parrett*, 737 F.2d at 694. Moreover, there may be special circumstances that sharply increase the severity of impact of what might otherwise be viewed as a routine employment decision. Under the *Delong* analysis these may all be taken into account. *Delong*, 621 F.2d at 624. The ultimate issue remains, however, whether a particular patronage decision "imposed so unfair a choice between continued employment and the exercise of protected beliefs and associations as to be tantamount to the choice imposed by threatened dismissal." *Id.*

In contrast to the Fourth Circuit's analysis in *Delong*, the Third Circuit has recently held that the rule enunciated in *Branti* and *Elrod* extends to any "disciplinary action" by a public employer. In *Bennis v. Gable*, 823 F.2d 723 (3d Cir. 1987), a group of police officers brought suit against several defendants. The officers alleged that the defendants demoted them for engaging in political activity, or alternatively, that the defendants demoted them to make room for the new mayor's political supporters. On appeal, the defendants argued that the plaintiffs' claims that they were demoted to make room for political supporters failed as a matter of law. The defendants contended that the rule enunciated in *Branti* and *Elrod* was strictly limited to patronage discharges and did not extend to practices that placed lesser burdens on the plaintiffs' associational interests. The Third Circuit rejected both this argument and the "substantial equivalent to dismissal" standard set forth in *Delong. Id.* at 731 n.9. According to the Third Circuit, the rule enunciated in *Elrod* and *Branti* was not limited by the harshness of a particular action but rather extended to the imposition of any "disciplinary action" imposed for the exercise of First Amendment rights. *Id.* at 731.

Delong and *Bennis* enunciate significantly different standards for analyzing patronage claims. *Delong* limits the rule enunciated in *Branti* and *Elrod* to constructive discharges. On the other hand, *Bennis* apparently extends the rule to a wide range of employment decisions, including decisions concerning routine transfers and promotions. We believe the *Delong* analysis is more sound.[3]

Delong properly extends the protections of *Branti* and *Elrod* beyond the narrow holdings of those cases to protect employees from patronage practices that may, as a practical matter, impose the same burden as the employees' outright termination. The *Delong* analysis, however, also properly takes into account the limited nature of the Court's holdings in *Branti* and *Elrod* and the fact that real differences exist between dismissals and other patronage practices. It also takes into account the substantial intrusion of the federal

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[3] In adopting the *Delong* analysis, we recognize that language in *Hermes v. Hein*, 742 F.2d 350 (7th Cir. 1984), indicates that a public employer may never take political factors into account. In *Hermes* two police officers alleged that they were denied promotions because eligibility tests and examination scores were "rigged" to favor other candidates who had local political support. The district court granted summary judgment on the ground that there was no evidence that political affiliations entered into the decisions. On appeal, this court stated that "the district court's grant of summary judgment . . . will be sustained if the only reasonable inferences from the record are that [the allegedly politically-favored candidates] would have been promoted regardless of their political affiliations." 742 F.2d at 353. The court then affirmed the grant of summary judgment.

Defendants here distinguish *Hermes* on the ground that *Hermes* involved elements of retaliation, that is, "rigged" test scores and eligibility lists. We do not find that distinction persuasive. Whatever the effect such conduct may have on other rights, we do not believe the First Amendment issue turns on whether political factors are taken into account in an underhanded manner. Nonetheless, the language in *Hermes* does not control this case. The holding of a previous panel of this circuit is binding on other panels. Dictum is not. *See generally United States v. Crawley*, 837 F.2d 291 (7th Cir. 1988). And the language in

(Footnote continued on following page)

courts into the political affairs of the states as well as the executive and legislative branches of the federal government that would necessarily flow from extending *Branti* and *Elrod* beyond constructive discharges.

By favoring political supporters or those who are connected with political supporters, a patronage system will unquestionably have some negative effects on those persons who do not support or are not connected with the party or faction in power. The partisan denial of a promotion, transfer, or employment application leaves someone in a worse position than he would have been absent patronage considerations. At the same time, however, the burden imposed by such patronage decisions is much less significant than the loss of a job.

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[3] *continued*

Hermes must be considered dictum. Because of its summary disposition of the case the panel did not, nor did it need to, test the merits of an extension of *Branti* and *Elrod*. The panel merely cited *Branti* and *Elrod* in a footnote for the undisputed proposition that the right not to associate is protected under the First Amendment. There is no discussion of the reluctance expressed in *LaFalce* to extend the holdings of *Branti* and *Elrod* or of the Fourth Circuit's decision in *Delong*. There is also no indication that, on appeal, the defendants challenged any unprecedented expansion of *Branti* and *Elrod*. If the patronage issue was necessary to its holding, the court would have gone into these issues in great detail. Moreover, we note that *Hermes* has not been cited in any patronage case decided by other circuits. Accordingly, because the language contained in *Hermes* is dictum, it does not control this case.

Furthermore, contrary to plaintiffs' suggestion, *Danenberger v. Johnson*, 821 F.2d 361 (7th Cir. 1987), does not support the proposition that patronage promotion decisions always violate the Constitution. In *Danenberger* the court upheld the dismissal of the plaintiff's complaint on the grounds of qualified immunity because no clearly established right to a promotional decision free of any political considerations existed at the time of the challenged promotion decision. *Id.* That the claim was dismissed on qualified immunity grounds in no way implies that such a constitutional right exists, *see Benson v. Allphin*, 786 F.2d 268, 279 n.26 (7th Cir.), *cert. denied*, 107 S.Ct. 172 (1986); it means only that there is no right, or *if* there is a right, it was not clearly established at the time at issue.

While we recognize that in a certain economic sense a person may be harmed as much by the failure to win a job as by the failure to keep one, we follow the plurality's approach in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). There the plurality stated that an affirmative action plan's discriminatory effects may be justified when it involves the loss of future employment opportunity but not when it involves the loss of a present position. The plurality reasoned that losing an employment opportunity is not as intrusive as losing an existing job. *Wygant*, 476 U.S. at 279-84 (plurality); *see also Steelworkers v. Weber*, 443 U.S. 193, 208 (1979) ("The [affirmative action] plan does not require the discharge of white workers and their replacement with new black hirees."). An employee on the job has an important stake in his position with his employer. His financial affairs and other obligations will be arranged around certain settled expectations that his paychecks will continue. The coercion and control that an employer may exercise over an employee by threat of termination is great. On the other hand, an applicant seeking employment has not arranged his affairs around any expectation of an income stream from the job he seeks. Instead of depriving him of his livelihood, a patronage system lowers his chances for receiving employment with one of many potential employers. If he is employed elsewhere, a rejected application will probably have little effect on his income.

Likewise, absent unusual circumstances, employment decisions not involving dismissals, such as failing to transfer or promote an employee, are significantly less coercive and disruptive than discharges. While a person denied a promotion or transfer will certainly be disappointed and may remain in a lower paying position, he still retains his job and his ability to meet his financial obligations.

The Sixth Circuit implicitly recognized the distinction between patronage discharges and less burdensome patronage practices in *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert.*

denied, 477 U.S. 905 (1986), which upheld patronage hiring practices against First Amendment attack. The plaintiff in *Avery* unsuccessfully applied for positions in three different county departments controlled by Republicans. The department heads filled vacancies with friends and relatives and with friends and relatives of their political supporters. Of the 432 persons hired in the three departments over a seven-year period, only ten were Democrats. The plaintiff did not receive a job because she was not connected to the patronage network. The three department heads testified at their depositions that they preferred hiring Republicans. One testified that he "would favor hiring qualified Republicans." Another stated that "all things being equal I prefer to have a Republican working for me because I assume that he will be more interested in taking part in helping me get re-elected." The third stated that "it just works better when people have the same philosophy." The district court granted summary judgment to the defendants on, among other grounds, the ground that *Branti* and *Elrod* did not extend to politically motivated hirings.

The Sixth Circuit affirmed. The court found that the First Amendment did not forbid a patronage system that relies on family, friends, and political allies for recommendations. While the court stated that a public employer could not bar a person from employment "solely" because of his political affiliation, the employer could rely on political favors in making decisions. The Sixth Circuit reasoned that the challenged patronage system was marked different from public employer actions that the Supreme Court had declared unconstitutional. The challenged patronage system had many legitimate purposes such as finding good employees, extending political and personal friendships, and enhancing the official's performance and political appeal. Moreover, the court noted that any rule forbidding an employer from considering political affiliation in hiring would require invalidating hiring practices in public offices nationwide.

When balanced against the more limited burdens imposed by patronage practices other than dismissing or constructively discharging an employee, other interests strongly weigh against broadly expanding the rule enunciated in *Branti* and *Elrod*. In a representative government, the courts must afford the political process and political institutions great deference. Extending *Branti* and *Elrod* to virtually all employment decisions would raise profound questions concerning democratic institutions that this court has previously found beyond our competence to answer. *See LaFalce*, 712 F.2d at 294.

Moreover, using political considerations in employment decisions is as old as this country. Although the age of a particular practice does not immunize it from constitutional challenge, *see, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954), "[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . . ." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (Holmes, J.). Thus, it is not irrelevant to our inquiry that George Washington and Thomas Jefferson were no strangers to either patronage hiring or the First Amendment. *See Elrod*, 427 U.S. at 377-78 (Powell, J., dissenting). The more widespread use of patronage, beginning with Andrew Jackson and extending to modern times, has been credited with increasing the level of participation in American politics. *Id.* at 377-80. By increasing the level of participation in American politics, patronage has also been credited with adding balance and stability to government. *Id.; see also Branti*, 445 U.S. at 526-32 (Powell, J., dissenting). As Justice Powell has stated in support of patronage practices:

> Broadbased political parties supply an essential coherence and flexibility to the American political scene. They serve as coalitions of different interests that combine to seek national goals. The decline of party strength inevitably will enhance the influence of special

> interest groups whose only concern all too often is how a political candidate votes on a single issue. The quality of political debate, and indeed the capacity of government to function in the national interest, suffer when candidates and officeholders are forced to be more responsive to the narrow concerns of unrepresentative special interest groups than to overarching issues of domestic and foreign policy.

Branti, 445 U.S. at 532 (Powell, J., dissenting).

Finally, we note that the practical considerations relied on by this court in *LaFalce* are even more compelling in this case. Recognizing the rights asserted by plaintiffs in this case would potentially subject public officials to lawsuits every time they make an employment decision. We doubt that there is a single disappointed employee who could not point to political disagreement, or simply lack of agreement between himself and a hiring official or the person who received the desired position. Political issues and beliefs do not come in neat packages wrapped "Democratic" and "Republican." A wide variety of issues, interests, factions, parties, and personalities shape political debate. Moreover, it is questionable whether "politics" could be meaningfully separated from other considerations such as friendships, compatibility, and the enthusiasm to pursue the stated job goals. The Supreme Court has shown great reluctance to have the federal courts preside as "Platonic Guardians" over state employment systems. *See Connick*, 461 U.S. at 143 ("[G]overnment offices could not function if every employment decision became a constitutional matter."); *Bishop v. Wood*, 426 U.S. 341, 349 (1976) ("[F]ederal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies.") By asking that we review virtually every significant employment decision for absolute political neutrality, plaintiffs essentially ask that we constitutionalize civil service and then preside over the system. This would be an unprecedented intrusion

into the political affairs of the states as well as the executive and legislative branches of the federal government. In the absence of a clear indication from the Supreme Court, we will not take such a large step.

In sum, we believe *Delong*'s analysis provides the appropriate inquiry in patronage cases involving practices other than the actual or threatened dismissal from employment. In the political world in which democratic institutions exist, courts should not interfere unless compelling reasons exist for doing so. Banning political considerations from all public service employment decisions, even if practical, would diminish the political will of the voters, insert courts into disputes between political factions, and stifle the ability of elected officials to govern. These public policy questions, rife with serious concerns over federalism and—in the case of federal employment—separation of powers, are best left in the political arena.

Having determined the appropriate analysis to apply to plaintiffs' claims, we must next determine whether, under that analysis, the district court properly dismissed plaintiffs' claims. Under Fed.R.Civ.P. 12(b)(6) a complaint may not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In making this determination, a court must resolve all reasonable inferences in the plaintiff's favor. *See Hanrahan v. Lane*, 747 F.2d 1137, 1139 (7th Cir. 1984). In light of the appropriate analysis and the stringent standards for Rule 12(b)(6) dismissals, we reverse the district court's decision to dismiss Standefer's, O'Brien's, Rutan's, and Taylor's claims, and affirm the decision to dismiss Moore's claim.

Moore alleges that he applied for jobs that were awarded to less qualified but politically favored persons. The district court correctly dismissed this claim. As we explained above,

rejecting an employment applications does not impose a hardship upon an employee comparable to the loss of job. *See Wygant v. Jackson Board of Education*, 476 U.S. 267 (1984) (plurality opinion); *see also Avery v. Jennings*, 786 F.2d 233 (6th Cir. 1986).[4] Failing to obtain a particular position disappoints, but no more so than the plaintiff's failing to obtain employment in *Avery*, 786 F.2d at 236-37, the contractor's failing to obtain a contract in *LaFalce*, 712 F.2d at 294, or the independent contractors' losing their working relationships with the state in *Horn*, 796 F.2d at 674-75, and *Sweeney*, 669 F.2d at 545-46. Any burden imposed on an employment applicant does not outweigh the significant intrusion into state government required to remedy such a claim. While the wisdom of patronage hiring practices is certainly open to debate, the validity of such practices is something more appropriately addressed to the legislature rather than the courts.

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[4] In *Avery v. Jennings*, 786 F.2d 233 (6th Cir. 1986), the Sixth Circuit indicated in dictum that hiring decisions based "solely" on party affiliation would violate the First Amendment. When faced with that dictum, a two-member majority of another Sixth Circuit panel "reluctantly" reversed a district court's decision to dismiss a complaint in which a plaintiff alleged that a hiring decision was based "solely" on political considerations. *Messer v. Curci*, No. 85-5626, slip op. (6th Cir. Dec. 2, 1986) (available on LEXIS), *vacated and rehearing en banc granted*, No. 85-5626 (6th Cir. Jan. 21, 1987) (order) (available on LEXIS). The majority believed the complaint failed to state a claim but decided for prudential reasons to follow *Avery*'s dictum. The third member of the panel dissented on the ground that the panel was not bound by the dictum and that the complaint failed to state a claim.

We agree with the panel in *Messer v. Curci* that it should not matter whether the complaint alleges that patronage was the "sole reason" or a "motivating reason." We do not believe the fact that Democrats filled 10 out of 432 available slots was dispositive on the issue of whether political factors may be taken into account by a public employer. *Avery* added this dictum to reconcile its holding with the Supreme Court's holdings in *Keyishian* and *Wieman* invalidating state laws banning Communists and other "subversives" from employment. These cases, however, are not controlling in the patronage area. Under the *Branti* and *Elrod* balancing test, different factors are involved in patronage cases.

The claims of Rutan and Taylor are more problematic than the claims of an employment applicant. Rutan alleges that she has been denied promotions that went to less qualified but politically favored persons. Taylor alleges that he has been denied a promotion that went to a less qualified but politically favored person. He also alleges that he was denied a transfer because he did not have the support of the Republican Party Chairmen in Fulton and Schuyler Counties. Although a close question, we believe the district court erred in dismissing these claims.

If we were reviewing this case after trial and the facts pleaded in the complaint constituted the only evidence in the record, the district court's judgment would be affirmed. As discussed above, merely failing to transfer or promote an employee is significantly less coercive or disruptive than discharging an employee. However, dismissing a complaint under Fed.R.Civ.P. 12(b)(6) is proper only if it appears beyond doubt that a plaintiff can prove no facts to support his claim. While it may be highly unlikely that a person who is merely denied a transfer or promotion can prove that the decision was the substantial equivalent of a dismissal, we cannot make this determination as a matter of law based on the minimal facts contained in the complaint. We are particularly reluctant to scrutinize Rutan's and Taylor's pleadings under freshly articulated standards. Whether a particular employment action is equivalent to a dismissal rests upon each case's facts and circumstances. *Cf. Clark v. Marsh*, 665 F.2d 1168 (D.C. Cir. 1981) (upholding finding of constructive discharge when aggravating circumstances led an employee to retire after being denied a promotion). If Rutan and Taylor can assert that some special circumstances present in their cases would have led a reasonable person to quit, they should be permitted to pursue any such claim.

We also note that both Rutan and Taylor appear to have remained in their positions after the challenged employment

decision. This is certainly relevant in determining the severity of the impact of the challenged patronage decision but does not as a matter of law prevent Rutan and Taylor from proceeding with their claims. We agree with the position implicit in *DeLong* that a First Amendment violation occurs when the burden placed upon a particular employee is substantially equivalent to a discharge. An employee could stay on the job and withstand very difficult circumstances that might cause others similarly situated to quit. Financial circumstances may not allow the person the luxury of resigning before finding other employment. That circumstances prevent an employee from resigning does not decrease the burden the employer has, in fact, placed upon him.

We emphasize that the issue is not whether partisan reasons entered into a particular employment decision. Rather, the issue is whether a partisan decision imposed such a burden upon a particular employee that it would have led a reasonable employee to quit. There are a wide variety of employment decisions made every day that result in disappointment to employees. For every person promoted there are several others who wish they had been. Federal court is not intended to be the final arbiter for every real or imagined slight claimed by disappointed employees. It is only when a particular patronage practice could *reasonably* be thought to be the substantial equivalent of a dismissal that such a practice violates the First Amendment.

Standefer's and O'Brien's claims are more straightforward. Standefer alleges that he was laid off from a "temporary position" at the State Garage in Springfield along with five other employees. The five other employees, who had the support of the Republican Party, were offered other state jobs. Standefer was not. Resolving all reasonable inferences from these facts in Standefer's favor, these allegations may support a claim that a public employer conditioned Standefer's continued employment with the State upon

Standefer's political affiliation. This is the type of conduct found constitutionally impermissible in *Branti* and *Elrod*.

This is not to say that a laid-off employee is automatically entitled to be considered for other positions with the state, or even his old position, without patronage considerations being taken into account. Failing to rehire after layoff does not in and of itself violate the rule enunciated in *Branti* and *Elrod*. Many laid-off employees will stand essentially in the position of new job applicants when they seek a position. But not all employees will be in that position. If a formal or informal system exists for placing employees into other positions, that system must not include partisan political considerations that cause an employee to lose his employment with the state.

On remand, the court must consider all the facts and circumstances of Standefer's case with the ultimate inquiry being whether a politically motivated failure to place Standefer in another position was the substantial equivalent of a termination from employment. In making this determination, we believe that several facts deserve special consideration. The district court should consider: whether the employment relationship was considered to be "temporary" rather than "permanent"; whether the "layoff" was merely the end of a temporary position or whether it was a true layoff; whether employees had reasonable expectations of placement into other positions upon layoff; whether the previous employment with the State was simply a minor factor considered with many others in an *ad hoc* process or whether it was essentially determinative in being placed in the new position; and, whether there was a substantial time lapse between the layoff and placement of other employees or whether the placement into other positions was made contemporaneously with the layoff. Although we have listed these facts, we do not purport to delineate every possible factor or the weight to be given to each factor. Rather, as

stated above, the court must look at all the facts and circumstances with an eye towards ultimately determining whether failing to place Standefer in a position after layoff was substantially equivalent to terminating his employment.

O'Brien alleges that he was laid off from a position at the Lincoln Development Center. He does not allege that he had any specific right to recall. But he does allege that, under the Center's policies, he could be recalled within two years, and if recalled, there would be no break in his seniority and other benefits. "Several months" after being laid off he received a position with the Department of Corrections in which he had no accrued seniority or benefits. In February of 1985 (apparently after he was working at the Department of Corrections), he was told by an administrator at the Center that he would be rehired if the Center received an exception to the "hiring freeze." The Governor's Office denied the request for an exception.

Laying off an employee suspends the employee's working relationship with an employer but does not usually terminate the relationship. Absent indications that the layoff of an employee is "permanent," a layoff will typically involve some formal or informal expectation of being placed back in the position if, within some specified or reasonable time period, the job becomes open once again. A person who has ordered his life around a particular job, built up experience and seniority in the position, and has a reasonable expectation of being recalled to that position stands in far different position than an employment applicant. After a layoff, a recall to the same job conditioned upon an employee's political affiliation is the type of inherently coercive conduct that *Branti* and *Elrod* found to violate the First Amendment.

There are some factors in O'Brien's case that take it beyond a straight failure to recall from layoff case. First, O'Brien does not allege that there was a general recall that he was left out of because he was not a Republican sup-

porter. In fact, he does not even allege that his position was filled by anyone within the two-year recall period. Absent these facts, he may have a difficult time proving his claims. Nonetheless, the allegation in the complaint that, absent political considerations, he would have been granted an "exception" to the "hiring freeze," and thus been reinstated into his job, is sufficient to state a claim for relief.

Second, O'Brien apparently held a position with the Corrections Department at the time he was denied an exception to the "hiring freeze." Thus, the alleged patronage system did not deny him employment altogether. Nonetheless, as discussed earlier, the fact that a person is on the state payroll does not automatically render the claim insufficient as a matter of law.

In sum, we affirm the district court's decision dismissing Moore's claim. We reverse the district court's decision dismissing the employment claims of the other plantiffs and remand for further proceedings consistent with this opinion.[5]

D. *Voter Challenges to Patronage Practices—Standing.*

In addition to challenging the alleged patronage system as employees, plaintiffs, as voters, also claim that the patronage system deprived them of "equal access and effectiveness of elections." Plaintiffs allege that the patronage system gives Governor Thompson and his supporters a significant ad-

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[5] On remand the district court should also "as soon as practicable" consider whether the individual employees may properly bring their claims as class actions. Fed.R.Civ.P. 23(c). In view of the individualized determinations necessary for the resolution of the claims, the district court should carefully scrutinize the claims before deciding to certify any class. *See generally General Telephone Co. v. Falcon*, 457 U.S. 147 (1982)

We also note that defendants have argued on appeal that they are entitled to qualified immunity from damages. Such a request is more appropriately addressed to the district court on remand.

vantage over their opposition in elections. The district court never reached the merits of this claim on the ground that the plaintiffs lacked standing. We agree.

In *Shakman v. Dunne*, 829 F.2d 1387 (7th Cir. 1987), *cert. denied*, 108 S.Ct. 1026 (1988), this circuit analyzed the standing requirement as applied to claims by candidates and voters challenging patronage hiring practices in Cook County, Illinois. In *Shakman*, the candidates and voters claimed that patronage hiring had the "purpose and effect" of giving incumbent Democratic officials a significant advantage in communicating with the electorate. The court rejected plaintiffs' claims, holding that the candidates and voters had no standing to challenge patronage hiring. In finding that the plaintiffs lacked standing, the court reasoned that the chain of causation between the challenged governmental activity and the alleged injury was to tenuous:

> [W]e find the line of causation between the appellants' activity and the appellees' asserted injury to be particularly attenuated. . . . [T]he line of causation depends upon countless individual decisions. Moreover, those countless individual decisions must depend upon . . . countless individual political assessments that those who are in power will stay in power. It is not the hiring policy itself which creates any advantage for the incumbents. Any other candidate is entirely free to assert that, if elected, he will follow the same policy. Any advantage obtained by the incumbent is obtained only if the potential workers make an independent evaluation that the incumbent, and not the opposition, will win. The plaintiffs will be at a disadvantage if—and only if—a significant number of individuals seeking political job opportunities determined the 'ins' will remain the 'ins.'

Id. at 1397. The court also noted that so many factors, many not even capable of articulation, determine a person's political activity that the plaintiffs could not say that their alleged injuries were "fairly traceable" to the defendants. *Id.; see also*

Winpisinger v. Watson, 628 F.2d 133 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980) (supporters of President Carter's primary opponent did not have standing to challenge Carter Administration award of 275,000 census jobs allegedly conferred on a political patronage basis).

Here, plaintiffs' standing argument is no different from that rejected in *Shakman*. In fact, plaintiffs made clear that their claims are virtually the same claims the district court held sufficient to confer standing in *Shakman* (which was reversed after oral argument in this case). *See Shakman*, 481 F.Supp. 1315 (N.D. Ill. 1979), *rev'd in relevant part*, 829 F.2d 1387 (7th Cir. 1987). Like the plaintiffs in *Shakman*, plaintiffs contend that patronage has created an advantage in favor of the incumbents.

This does not confer standing on voters. The causal link between any "loss" in their votes' impact and the challenged actions is too tenuous. Indeed, plaintiffs' statewide challenge presents a more tenuous causal relationship that the challenge mounted in *Shakman* by voters *and* candidates to patronage hiring in a single county. Because the injury asserted in the complaint is not fairly traceable to the challenged action, the district court properly dismissed plaintiffs' claims as voters for lack of standing.

Each side shall bear its own costs.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

RIPPLE, *Circuit Judge*, concurring in part and dissenting in part. I join that part of the court's judgment dismissing the plaintiffs' claims, brought as voters, which assert that the patronage system deprives them of "equal access and effectiveness of elections." R.1 at ¶ 24(d). As the majority notes, that aspect of this case is governed by our holding in *Shakman v. Dunne*, 829 F.2d 1387 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1026 (1988).

I also concur in that portion of the judgment that remands the claims of Cynthia Rutan, Franklin Taylor, Rickey Standefer, and Dan O'Brien to the district court for further proceedings. However, I respectfully part company with my brothers on the appropriate test that ought to be applied upon remand. Today, the majority adopts the wooden analysis of *Delong v. United States*, 621 F.2d 618 (4th Cir. 1980), a test formulated immediately after the Supreme Court's decision in *Branti v. Finkel*, 445 U.S. 507 (1980), and one that has not gained respect in the other circuits that have had the time to take a more measured view of the holding of *Branti*. As the majority points out, the Third Circuit has explicitly disavowed the *Delong* approach in *Bennis v. Gable*, 823 F.2d 723 (3d Cir. 1987). Moreover, this circuit and the Eleventh Circuit have also taken far more reasoned approaches to the analysis of *Branti* and *Elrod v. Burns* 427 U.S. 347 (1976), *See Hermes v. Hein*, 742 F.2d 350, 353 (7th Cir. 1984); *Waters v. Chaffin*, 684 F.2d 833, 837 n.9 (11th Cir. 1982).[1]

Although the *Delong* test attempts to apply the *Elrod* criteria to cases not involving discharge, its approach is an illusory one. It places an unrealistic burden of proof on the

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[1] The *Delong* test has met a similar fate at the hands of a panel of the First Circuit. *See Agosto De Feliciano v. Aponte Roque*, No. 86-1300 (1st Cir. Aug. 14, 1987) (1987 U.S. App. LEXIS 10833). That opinion has now been vacated and the case has been reheard en banc. The matter is presently *sub judice*.

plaintiff and creates an impossible judicial task. To succeed, the plaintiff must establish that, although a reasonable person would resign under such pressure to his first amendment rights, he has decided to "hang on." It is not surprising that the *Delong* test would produce such an unrealistic burden of proof; it is premised on a fundamental misapprehension of the analysis required by established first amendment jurisprudence. As the Third Circuit noted in *Bennis*, "the constitutional violation is not in the harshness of the sanction applied, but in the imposition of any disciplinary action for the exercise of permissible free speech." 823 F.2d at 731 (footnote omitted). The government must establish that the particular restriction on first amendment freedoms which it desires to impose can be justified by the important needs of the government. *See Connick v. Myers*, 461 U.S. 138, 142 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967); *see also McGill v. Board of Educ. of Perkin Elementary School Dist. No. 108*, 602 F.2d 774, 780 (7th Cir. 1979). If the government cannot justify the need to restrict the first amendment freedoms of an individual for an important governmental reason, it may not impose any punishment on that individual for the exercise of his first amendment rights. By contrast, the majority's approach is simply a manifestation of its willingness to tolerate "minor punishment" for the legitimate exercise of first amendment rights. The majority tells the public employee that, even if the government has no legitimate need to curtail his first amendment rights, it may subject him to discrimination and any other form of abuse as long as it does not go too far and create a situation where a reasonable employee would say "enough" and resign. Such a statement of the law is simply not correct. *See Connick*, 461 U.S. at 142; *Branti*, 445 U.S. at 515 n.10. As this court noted in *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982), "[t]he effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their con-

stitutional rights it need not be great in order to be actionable."[2]

The majority's holding today will subject countless dedicated government workers, for whom party affiliation is not an "appropriate requirement for the effective performance of the public office involved," *Branti*, 445 U.S. at 518, to harassment because they have chosen not to contribute to or work for a particular candidate or cause. For instance, the clerical worker who has strong views on the abortion issue and refuses to support a candidate of opposing views may now be passed over for promotion, denied transfer to a more favorable location, or assigned the most undesirable tasks in the office. The worker who decides not to support a particular candidate because, in the worker's view, the candidate is not committed to racial equality can be treated in

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[2] The analysis appropriate for infringements on freedom of speech also applies to associational rights. As the Supreme Court noted in *Perry v. Sindermann*, 408 U.S. 593 (1972):

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech. For if the government could deny a benefit to a person *because of his constitutionally protected speech or associations*, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 426. Such interference with constitutional rights is impermissible.

Id. at 597 (emphasis supplied).

Even if we assume, arguendo, that more of a burden is permissible when we are dealing with the implied right of freedom of association rather than the explicit right of free speech, the threatened loss in this case is clearly sufficiently burdensome to amount to a substantial burden on the plaintiffs' first amendment rights. *See Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982).

identical fashion. This growing acceptance of infringements on first amendment rights on the ground that the curtailment is minor is indeed a disturbing trend. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way . . . ." *Boyd v. United States*, 116 U.S. 616, 635 (1886).[3]

I must also respectfully dissent from the decision to affirm that portion of the district court's judgment that dismisses on the complaint the allegation of James Moore that his freedom of association was violated by the policy of the state to hire only those applicants who were determined to be politically acceptable. Patronage hiring admittedly presents a different situation from politically based firings and adverse personnel actions against state employees. However, as the majority appears to concede, the use of political criteria in the hiring process does implicate first amendment rights. Therefore, it must be determined whether the state's purpose in utilizing such politically based criteria serves a sufficiently important governmental interest to permit the curtailment of first amendment freedoms.

The fundamental flaw in the majority's approach is that it pays only lip service to the basic standard governing dismissals under Rule 12(b)(6):

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no

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[3] The majority also appears to invoke a rule of necessity to justify its course. It fears that the adoption of any rule other than the *Delong* test will transform the federal courts into a "supercivil service bureau" for all state and federal employees. Even if we assume that such concerns are relevant, we would be left with the fundamental reality that the protection of first amendment rights is indeed the proper work of the federal court. Our litigation process contains adequate steps to eliminate nonmeritorious cases.

set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In complex cases involving both fundamental rights and important questions of public policy, such peremptory treatment is rarely appropriate. *See Hobson v. Wilson*, 737 F.2d 1, 31 n.88 (D.C. Cir. 1984) (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1230 (1969 & Supp. 1984)), *cert. denied*, 470 U.S. 1084 (1985). In neither *Branti* nor *Elrod* did the Supreme Court attempt to deal with patronage practices on such a meager record. Nor did the Sixth Circuit attempt such a feat in *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 106 S. Ct. 3276 (1986). Significantly, *Avery* was decided on a motion for summary judgment rather than a 12(b)(6) motion to dismiss. Thus, the court had the benefit of greater detail as to how the patronage system actually operated:

> The political affiliation of a job applicant is taken into account in the hiring process in a round-about sort of way. As jobs become available, the official for the most part fills the vacancies informally on an *ad hoc* basis with friends, relatives, or acquaintances, or with the friends or relatives of political allies. Since plaintiff was unconnected with this network, her application was not considered.

Id. at 234.[4]

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[4] *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984), was decided on the pleadings. *LaFalce* involved the claim of an unsuccessful bidder who challenged the city's use of political considerations in the awarding of public contracts. However, the court's task in *LaFalce* under the first amendment encompassed a far more simple and focused inquiry of competing interests than is true in this case. In *LaFalce*, the actual operation of the bidding system and its effects on individual contractors were fairly straightforward and well defined. The court itself acknowledged that the situation of contractors, presented in that case, and that of public employees, as is presented here,

(Footnote continued on following page)

As the majority points out, this case involves individual plaintiffs, not a class action. It also involves one particular political patronage system. However, we know very little, on the basis of the complaint alone, about the impact of this political patronage system on the first amendment rights of job applicants. We also know very little about the justification for this political patronage system. In my view, this case should be remanded to the district court. There, after adequate development of the record, the district court will be able to accomplish several tasks that are essential to a full and fair analysis of this case: 1) a thorough examination of the operation of *this* patronage system and the effect of that operation on the plaintiff; and 2) a thorough examination of the justifications for this particular system proffered by the defendants.

On the basis of the complaint, we do not even know the specific requirements imposed by this patronage system on the job applicant. We cannot determine, simply on the basis of the complaint, the degree to which the alleged patronage practices—or any combination of them—actually infringe on the first amendment rights of the plaintiff. It is not at all clear what a prospective employee must do to win the endorsement of the party representatives. There is a significant, and perhaps crucial, difference between a prospective government employee's having to be a registered Republican and having to do political work that involves endorsing publicly particular political positions that the applicant does not

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[4] *continued*

are not analogous because the relative strength of the competing interest in the two classes of plaintiffs differs significantly—so much so that the first amendment claim of the public contractor could be foreclosed on a motion to dismiss. Perhaps the court was justified in the public contracting context in treating the plaintiff's claim summarily. However, we should not extend such a summary treatment of first amendment rights to a case such as this one that squarely implicates the contours of Supreme Court precedent.

espouse or being required to pay the party in order to obtain favorable action on a job application.

Not only do we know very little about the actual operation of this particular patronage system and the resultant degree of infringement or the applicant's first amendment rights, we also know very little about the countervailing need of the state government for such a patronage system. Although the majority discusses at length the benefits of a strong patronage system, its evaluation of those benefits is not based on any knowledge of the *actual* operation of *this* system. Rather, its evaluation appears to be based on two sources totally external to this litigation: 1) the majority's own predilections; and 2) the majority's agreement with the conclusions of the dissenting justices of the Supreme Court of the United States in *Branti* and *Elrod*. Neither is an appropriate basis for decision by judges of an intermediate appellate court. It is perfectly proper and, indeed, unavoidable, for judges to *evaluate* the facts of a case in terms of their own experience. However, to perform that task, one must first know the facts of the case; at this stage of the proceedings, we simply do not have that information. To evaluate, on the basis of the pleadings alone, the need for such an extensive patronage system is pure *ipse dixit*. Similarly, the majority cannot dismiss this complaint on the basis of the dissenting opinions in *Elrod* and *Branti*. I respectfully submit that, as an intermediate appellate court, we ought not rely on a point of view that higher authority has rejected unless we can demonstrate that the *record* before us justifies such a deviation. Here, of course, we have no record other than the complaint. In short, adjudication of the issue of patronage hiring requires a far more focused inquiry than this court can possibly undertake at this stage of the proceedings.

In my view, the patronage hiring claim ought to be remanded to the district court for further development of the

record. That court can then render a considered judgment as to whether the rights of this plaintiff have been violated. On review, the judges of this court will be able to evaluate the judgment on the basis of the record—not on the basis of their own suppositions or predilections.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

CYNTHIA RUTAN, et al.,
Plaintiffs,
vs.
THE REPUBLICAN PARTY OF ILLINOIS, et al.,
Defendants.

No. 85-3362

ORDER

INTRODUCTION

The defendants' motions to dismiss for failure to state a claim are pending before the court. Cynthia Rutan, Franklin Taylor, Dan O'Brian, Ricky Standefer, and James Moore filed this action on July 1, 1985, in their individual capacities and on behalf of six asserted plaintiff classes. These classes include: (1) all voters in the State of Illinois; (2) all taxpayers in the State of Illinois; (3) all employees of the State of Illinois who desire a promotion; (4) all employees of the State of Illinois who desire a transfer; (5) all employees of the State of Illinois who have been laid off but not rehired; and (6) all persons who desire employment with the State of Illinois.

The defendants include the Republican Party of Illinois, two Republican Party officials, Governor James R. Thompson, and seven former or current state government officials. The state officials, including Governor Thompson, are sued individually and in their official capacities. In addition, the defendant Greg Baise is sued as representative of a purported defendant class consisting of all "directors, heads or chief executive officers . . . since February 1, 1981, of departments, boards, and commissions under the jurisdic-

tion of the Governor of the State of Illinois." The defendant Lynn Quigley is likewise sued as a representative of a purported defendant class consisting of all "liaisons" between the Governor's Office of Personnel and the departments, boards, and commissions under the jurisdiction of the Governor since February 1, 1981.

ALLEGATIONS

The gravamen of the plaintiffs' complaint is that the defendants allegedly have conspired to create an employment system whereby decisions regarding the hiring, promotion, transfer, and rehire from lay off of the State's approximately 60,000 employees under the jurisdiction of the Governor are "substantially motivated by political considerations." The allegations which pertain to the experiences of the five named plaintiffs indicate that affiliation with the Republican Party is a key factor used in employment decisions made by the Governor's Office of Personnel.

Cynthia Rutan, an employee of the Department of Rehabilitative Services of the State of Illinois, alleges that she applied for a promotion to a section of the department called Adjudicative Services. The plaintiff Cynthia Rutan was not affiliated with the Republican Party at the time she sought promotion. She did not get the promotion. She alleges that the position was filled by someone less qualified but someone who was favored on a political basis by the Governor's Office of Personnel.

The plaintiff alleges she acquired a form distributed by the Republican Party Precinct Committeeman in her area which seems to be an application for promotion. The form is attached to the complaint as Exhibit B. The plaintiff does not allege that she was called upon to complete and to submit the form in connection with her application for promotion. This form seeks information regarding the applicant's vote in the primary elections. It also requests information about

the applicant's membership in the Lincoln Club of Sangamon County. Finally, it asks whether the applicant would be willing to become active in the Sangamon County Republican Foundation and to work in the precinct for candidates the Central Committee recommends as qualified for local, state, and national offices. The final line of the application requires a notation of approval or disapproval by the precinct committeeman.

The plaintiff Franklin Taylor currently works for the Illinois Department of Transportation. He applied for a promotion in July of 1983. A less qualified and less senior person got the promotion. This less senior person had received the support and approval of the Fulton County Republican Party. The plaintiff Taylor later requested a transfer to a different county. He was advised that the transfer could not be granted because the Republican Party for the counties he was transferring from and to had not approved of the request. The plaintiff Taylor is not an active supporter of the Republican Party.

Ricky Standefer was a temporary employee in 1984. In November of 1984 he and five other people were laid off. The five other people were offered other jobs. The plaintiff alleges they were offered other jobs because they had Republican Party support. The plaintiff Standefer had voted in the Democratic Party primary, presumably in 1984.

The plaintiff O'Brien was an employee of the State of Illinois and worked at the Lincoln Development Center of the Department of Mental Health and Developmental Disabilities. Plaintiff O'Brien was laid off in 1983. He was notified in 1984 that he was being recalled to work and that his recall depended upon an approval from the Governor's office in Springfield. In mid-1985 the plaintiff was told that the recall was not approved in Springfield. The plaintiff finally received a position with the State of Illinois, but only after he obtained the support of the Chairman of the

Republican Party of Logan County. The plaintiff has voted only once in a primary election and that was in a Democratic primary.

The plaintiff Moore was an applicant for a position with the State of Illinois. In August of 1980 the plaintiff Moore received a letter from his Republican State Representative. This letter is attached to the complaint as Exhibit C. The letter explains to the plaintiff that he should get the endorsement of the Republican County Chairman and the Precinct Committeeman to further his application. The plaintiff alleges that while he was attempting to get a position with the state, Victor English, the son of the current Chairman of the Polk County Republican Central Committee, Brian Burk, the son-in-law of the Vice-Chairman of the Precinct Committeewoman of the Polk County Republican Central Committee, and Dorris Thomas, plaintiff Moore's Republican Precinct Committeeman have all been hired by the state government in positions for which the plaintiff Moore was qualified.

DISCUSSION

I.

The plaintiffs contend that the defendants' use of political considerations in employment decisions offends their constitutional rights to free speech and association, due process and equal protection, and to a republican form of government. The strongest of the plaintiffs' claims is that the defendants' conduct violates their First Amendment rights to free speech and association. The plaintiffs rely on the Supreme Court decisions of *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel* 445 U.S. 507 (1979), for the proposition that public employment cannot be conditioned on an employee's affiliation with a particular political party that is in power. The Supreme Court in both *Elrod* and *Branti* declared that the practice of firing employees who were hired by the administration that had been supplanted vio-

lated the First Amendment. The defendants respond that the *Elrod* and *Branti* decisions are limited to political firings; they do not apply to the use of political considerations in hiring, promoting, transferring and rehiring state employees. They argue that the use of political considerations in aspects of public employment other than punitive actions like discharge is constitutionally permissible. The court is persuaded that the defendants' position is correct and will dismiss the Section 1983 claims alleging violations of the First Amendment for the following reasons.

The Supreme Court explicitly limited its rulings in both *Elrod* and *Branti* to political firings. *Elrod v. Burns,* 427 U.S. 347, 353 (1976); *Branti v. Finkel*, 445 U.S. 507, 513 n.7 (1980). Mindful of this, federal courts have rejected attempts to extend *Elrod* and *Branti* beyond firings or similar punitive personnel actions.[1] Two courts of appeal have recently considered the question of the use of patronage. *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), cert. denied 464 U.S. 1044 (1984) and *Avery v. Jennings,* 786 F.2d 233 (6th Cir. 1986). These courts refused to extend *Elrod* and *Branti* to prohibit the use of political factors in awarding contracts and in hiring public employees.

In *LaFalce v. Houston,* 712 F.2d 292 (7th Cir. 1983), cert. denied, 464 U.S. 1044 (1984), the Seventh Circuit affirmed the district court's dismissal of a complaint in which a contractor alleged he had been improperly denied a public contract based upon political considerations. The court in

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[1] Some courts have extended *Elrod* where the adverse employment action is essentially punitive or amounts to a dismissal. See e.g., *DeLong v. United States*, 621 F.2d 618, 624 (4th Cir. 1980) (punitive reassignment and transfer "tantamount to dismissal"). But cf. *Cullen v. New York State Civil Service Commission*, 435 F. Supp. 546 (E.D.N.Y.) appeal dismissed 566 F.2d 846 (2nd Cir. 1977) (court refused dismissal because the plaintiffs alleged denial of promotions for failure to make a one percent of salary contribution to a political party). However, commentators have urged federal courts to extend *Elrod* and *Branti* to personnel actions other than discharge. See e.g., Hoffinger, First Amendment Limitations on Patronage Employment Practices, 49 U. Chi. L. Rev. 181 (1982).

LaFalce reasoned that *Elrod*'s per se prohibition of political firings is based on the principle "that public employees would be discouraged from expressing their true political views if it might cost them their jobs." Id. at 293. In rejecting plaintiff's claim that unsuccessful contractors would similarly be discouraged from expressing their political beliefs, the court considered the extent to which patronage practices interfere with the expression of official views. Id. at 294. The court found the "extent of the likely interference" insufficient to raise constitutional concerns.

> If the contractor does not get the particular government contract on which he bids, because he is on the outs with the incumbent . . ., it is not the end of the world for him; there are other government entities to bid to, and private ones as well. It is not like losing your job.

Id. (emphasis added). Moreover, the court expressed grave doubts about the wisdom of a constitutional ruling forbidding the use of political considerations in this context.

> Against the uncertain benefits of such a rule in promoting the values of the First Amendment must be set the unknown but potentially large costs. To attempt to purge government of politics to the extent implied by an effort to banish partisan influences from public contracting will strike some as idealistic, others as quixotic, still others as undemocratic, but all as formidable. Patronage in one form or another has long been a vital force in American politics.

Id.

The court, referring to the plaintiff's claim to protection under *Elrod*, concluded:

> We are particularly reluctant to take so big a step in the face of the Supreme Court's apparent desire to contain the principle of *Elrod* and *Branti*. . . .

Id. at 294-95.

The defendants also rely on *Avery v. Jennings*, 786 F.2d 233 (6th Cir. 1986), in which the Sixth Circuit addressed the question whether *Elrod* and *Branti* extend to political hiring decisions by elected officials. In *Avery* the plaintiff brought a class action suit alleging that her political beliefs had disqualified her from consideration for public employment. The district court granted summary judgment in favor of the defendants. On appeal, the Sixth Circuit affirmed, concluding that *Elrod* and *Branti* do not prohibit the practice of hiring applicants who are friends or are referred by political allies. 786 F.2d at 237.

The defendants' reliance on *Avery* is somewhat misplaced. Both the District Court and the Court of Appeals relied on evidence submitted by the parties to conclude that a First Amendment cause of action had not been established. This court must rule on a motion to dismiss relying solely on the allegations of the complaint. On a Federal Rule of Civil Procedure 12(b)(6) motion, all well-pleaded allegations of the complaint are deemed admitted, with every reasonable doubt resolved in favor of the pleader. See *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969), *Hanrahan v. Lane*, 747 F.2d 1137, 1139 (7th Cir. 1984); *Burns v. Paddock*, 503 F.2d 18, 25 (7th Cir. 1974); *Williams v. Lane*, 548 F. Supp. 927, 929 n.2 (N.D. Ill. 1982). The complaint should not be dismissed unless it appears that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Jenkins*, 395 U.S. at 422; *Hanrahan*, 747 F.2d at 1139. However, the principles articulated in *Avery* are helpful in interpreting the current state of the law on the use of political factors in hiring. The Sixth Circuit urges that federal courts not become

involved in a review of hiring decisions made by public employees.

> Although the informal hiring practice in question here places some burden on the associational rights of prospective job applicants, that burden does not rise to the level of constitutional deprivation. Under the first amendment, government actions receive a much higher degree of scrutiny when those actions are aimed at restricting the content of speech than when the burden on the protected activity is an incidental consequence of other legitimate governmental concerns. Compare *Keyishian v. Board of Regents,* 385 U.S. 586 (1967) (invalidating statute restricting employment of communists) with *Kovacs v. Cooper,* 336 U.S. 77 (1949) (upholding limits of use of sound trucks in political campaigns) and *Prince v. Massachusetts,* 321 U.S. 158 (1944) (upholding application of child labor laws to use of children for distribution of religious literature). See also L. Tribe, American Constitutional Law, 580-81 (1978). In the instant case the officials in question had no firm rule, regulation, or established policy foreclosing employment based on political affiliation, but their hiring system had the effect of giving weight to party affiliation.

There is a significant difference between a patronage system that intentionally uses a strict political test as the standard for hiring or firing decisions, as in *Elrod, Branti, Keyishian, Mitchell,* and *Wyman,* supra, and a patronage system that relies on family, friends, and political allies for recommendations. The former has a single end tied to political belief. The latter has multiple purposes--finding good employees, maintaining and

extending personal and political relationships, creating cooperation and harmony among employees. The former is designed to call attention to political differences and punish those who differ. The latter is designed to enhance the official's performance and political appeal. The former requires no weighing or balancing of factors by the elected official or the reviewing court. The latter takes into account many factors and nuances, conscious and unconscious, and its review would involve the federal courts in the complex and subjective hiring practices of elected officials at every level of government.

Elrod and *Branti* did not affect normal patronage hiring systems in the United States because they were strict political affiliation discharge cases. Invalidation of informal hiring networks like those in the instant case because they lead to disproportionate representation of one political party or to a disproportionate number of liberals or conservatives would require abolition of the hiring systems for office workers and thousands of legislative, executive, and judicial offices across the country. In order to prevent patronage under the present systems, the courts would have to constitutionalize a civil service system and oversee its operation. There is no precedent for this reading of the First Amendment. Balancing the harm sought to be remedied--the tendency of the present systems to prefer particular political parties in different offices--against the legitimate needs of elected officials to hire in some manner effective employees who will not be blind to the public nature of the work and the political needs of their employer, we conclude that the hiring systems used by the defen-

dants did not abridge plaintiff's right of free speech under the First Amendment.

Avery v. Jennings, 786 F.2d at 236-37. A similar warning against federal court involvement in hiring decisions was articulated by Judge Campbell in *Illinois State Employees Union, Council 34 etc. v. Lewis,* 473 F.2d 561, 576 (7th Cir. 1972) (concurring).

The defendants rely as well on *Messer v. Curci,* 610 F. Supp. 179 (E.D. Ky. 1985), appeal pending, No. 85-5626 (6th Cir.) in which two seasonal workers challenged the decision of a city department not to rehire them. The court treated the plaintiffs' allegations as a hiring decision and concluded that *Elrod* did not support plaintiffs' claims for relief. The court noted that Supreme Court decisions have reflected a desire to "restrict the scope of First Amendment litigation of public employees." 610 F. Supp. at 184, citing *Connick v. Myers,* 461 U.S. 138 (1983).

The plaintiffs, however, allege more than a failure to hire. The allegations include instances in which political affiliation was taken into account in promoting, transferring, and rehiring laid off state employees. The court takes note of the plaintiffs' reliance on cases in which various employment practices were used to punish certain plaintiffs for the exercise of their First Amendment rights. Plaintiffs' Memorandum at 18, *McGill v. Board of Education,* 602 F.2d 774 (7th Cir. 1979); *Knapp v. Whittaker,* 757 F.2d 827 (7th Cir.), cert. denied 106 S. Ct. 36 (1985); *Bart v. Telford,* 677 F.2d 622 (7th Cir. 1982); and *Muller v. Conlisk,* 429 F.2d 901 (7th Cir. 1970). These cases are inapposite for two reasons. First, they do not involve allegations that political patronage deprived plaintiffs of their First Amendment rights. Second, unlike the case at bar, the plaintiffs-employees in the foregoing cases suffered punitive personnel actions in retaliation for their exercise of protected First Amendment speech. Similarly, both *Dendor v. Board of Fire and Police Commissioners,* 11

Ill. App.3d 582 (1st Dist. 1973) and *Hasentab v. Board of Fire and Police Commissioners,* 71 Ill. App.3d 244 (5th Dist. 1979) involved allegations of direct retaliation for the exercise of employees First Amendment rights.

The plaintiffs' allegations are too vague and inconclusive to support a scenario of punitive actions based solely upon political belief. Cynthia Rutan does not allege that her failure to be promoted was directly related to her own political activity. Cf. *Bart v. Telford,* 677 F.2d 622 (7th Cir. 1982) (reversing dismissal of a complaint because of allegations that plaintiff was being retaliated against for her political speech) and *Blameuser v. Andrews,* 630 F.2d 538 (7th Cir. 1980) (applicant for ROTC promotion stated claim because denial linked to his Nazi writings). Franklin Taylor alleges that his request for a transfer had to be approved by the Republican Party Chairman. He does not allege that he was being punished for speaking out on an issue of public concern. Cf. *McGill v. Board of Education,* 602 F.2d 774 (7th Cir. 1979) (teacher stated claim based upon transferd after she voiced complaints and "stirred up trouble"). Ricky Standefer suggests that others were given jobs because they had Republican Party support. He does not allege that he was laid off because he had taken a political position. Dan O'-Brien claims that others who were less qualified than he were given jobs and he suggests it was because of their political connections. Again, there is no direct allegation of retaliation or punishment due to an expression of political belief. Finally James Moore alleges that his employment prospects were explicitly conditioned on political sponsorship. He then alleges that others who were politically connected were hired for positions that Moore was qualified to fill, but not necessarily positions for which he had applied. There is no allegation that the plaintiff James Moore was being retaliated against or punished for maintaining a certain stand or political position.

The plaintiffs argue that their allegations should withstand dismissal because the complaint is essentially a duplicate of that which was presented in the successful challenge to patronage practices in Cook County, Illinois. *Shakman v. Democratic Organization of Cook County,* 481 F. Supp. 1315 (N.D. Ill. 1979), appeal pending, *Shakman v. Dunne,* Nos. 85-1870, 85-1911, 85-1912 (7th Cir.). However, the *Shakman* case is quite different from the plaintiffs'. Judge Bua explicitly declined the invitation to rule on the constitutional rights of applicants for state employment. Standing to proceed was granted only to candidates and voters in Cook County, Illinois. 481 F. Supp. at 1327. To the extent that Judge Bua reads *Elrod* as extending to hiring decisions, the court disagrees because that interpretation is at odds with the more recent rulings in *LaFalce, Avery,* and *Messer*. See *Shakman,* 481 F. Supp. at 1327-28 n.9 (where court took position that the Supreme Court intended that *Elrod* extend to hiring decisions).

The plaintiffs also assert their First Amendment claims as taxpayers and as voters. They incorrectly cite to *Shakman* as support of their claims as taxpayers. Judge Bua found no taxpayer standing, noting that taxpayers may challenge only those expenditures that operate to restrict the exercise of the taxing and spending power. Id. at 1322 n.l. See *United States v. Richardson,* 418 U.S. 166, 173 (1974) and *Flast v. Cohen,* 392 U.S. 83, 106 (1968). The plaintiffs fail to make such a claim.

Judge Bua did find that *Shakman* had standing as a candidate for office and as a voter. 481 F. Supp. at 1322. He explicitly rested his ruling on a finding that the challenged patronage employment doctrines directly burdened constitutionally protected interests of candidates for political office. Id. The plaintiffs, however, allege no more than the observation that the employment practices "create a significant political effort" in favor of the defendant Thompson and his political allies. They fail to present any allegations or

even argument suggesting that the employment practices affect election outcomes. Without a more direct link to the defendants' conduct, any injury plaintiffs suffer as voters is illusory. Standing as voters requires more. See *Winpsinger v. Watson,* 628 F.2d 133,137 (D.C. Cir. 1980) (Kennedy supporters had no standing to challenge Carter's patronage hiring). The plaintiffs' conclusions fail to state a claim for a violation of the First Amendment rights of voters in the State of Illinois.

The plaintiffs' nonetheless urge this court to allow the case to proceed until the defendants can offer a compelling reason for use of political considerations in hiring. That balancing test, the plaintiffs argue, is required by a line of First Amendment decisions beginning with *Keyishian v. Board of Regents,* 385 U.S. 589 (1967) and applied in *Elrod,* 427 U.S. at 363. The *Keyishian* decision and other cases relied upon by the plaintiffs provide no guidance on the issues in this case. The general principles of First Amendment jurisprudence, and many of the cases cited by the plaintiffs, were distinguished by the Sixth Circuit in *Avery*:

> Under the first amendment, government actions receive a much higher degree of scrutiny when those actions are aimed at restricting the content of speech, than when the burden on the protected activity is an incidental consequence of other legitimate governmental concerns.

786 F.2d at 236. Here, as in *Avery*, any incidental effect that might flow from the use of political considerations in employment decisions does not trigger the analysis of *Keyishian* and other cases that involve direct restrictions on speech. Furthermore, the principal cases relied upon by the plaintiffs involve the dismissal of a public employee for the exercise of his constitutionally protected speech. See *Pickering v. Board of Education,* 391 U.S. 563 (1968); *Keyishian v. Board of Regents,* 385 U.S. 589 (1967). In the instant case, there is no

allegation that the plaintiffs were discharged or threatened with discharge.

II.

The plaintiffs have also conceded in their memoranda and in oral argument that certain allegations of rights violations in their complaint do not state a claim. First of all, the plaintiffs concede that, under *Grimes v. Smith*, 776 F.2d 1359 (7th Cir. 1985), their complaint is insufficient. The plaintiffs cannot recover under Section 1985(3) for damages caused by a political but wholly non-racial conspiracy among private parties. See Plaintiffs' Memorandum at 38. Secondly, the plaintiffs concede that their allegation that the Guarantee Clause, Article IV, Section 4 of the United States Constitution, has been violated by the defendants' actions is also without basis. Ever since the decision in *Luther v. Warden*, 48 U.S. (7 How.) 1 (1849), the Supreme Court has repeatedly held that whether the Guarantee Clause has been violated is not a judicial, but a political question. Enforcement of this clause is for Congress and not for the courts. *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937); *Mountain Timber Co. v. Washington*, 243 U.S. 219, 234 (1917). The Supreme Court has refused to resort to the Guarantee Clause as a source of a constitutional standard for invalidating state action. *Baker v. Carr*, 369 U.S. 186, 223 (1962). It is clear that the plaintiffs' allegations fail to state a cause of action regarding a violation of this right.

Also, the court is persuaded that the plaintiffs fail to allege properly a cause of action under the Due Process Clause of the Fourteenth Amendment. The plaintiffs claim that the use of political considerations in employment decisions violates their right to due process under the Fourteenth Amendment. To determine whether the due process requirements of the Fourteenth Amendment apply in the first place, the court must look to the nature of the interests at stake. *Board of Regents v. Roth*, 408 U.S. 564, 570-71

(1972). The plaintiffs must establish that the interests they assert are within the ambit of the Fourteenth Amendment's protection of property. Id. The plaintiffs attempt to satisfy this prerequisite by claiming that the Illinois Personnel Code, Ill. Rev. Stat. ch. 127, § 63(b)(101) (1985) et seq. vests in them "certain property interests" which the employment process allegedly disregards. However, it has been long settled in Illinois that, at least in situations other than discharge, a public employee has no property right in public employment which falls within the protection of the Due Process Clause of either the state or federal constitution. *Levin v. Civil Service Commission*, 52 Ill.2d 516, 521 (1972).

The plaintiffs' allegation that the Equal Protection Clause of the Fourteenth Amendment has been violated by the defendants' actions also fails to state a claim. The plaintiffs seem to contend that the alleged employment system permits state officials to obtain political support for Republicans statewide, while Democratic office holders in Cook County are restrained from doing so by court order, including a 1972 consent decree, in *Shakman v. Democratic Organization of cook County*, No. 69C2145 (N.D. Ill.) appeal pending, *Shakman v. Dunne*, Nos. 85-1870, 85-1911, 85-1912 (7th Cir.). There is no standing for plaintiffs' challenge. The plaintiffs never state how restrictions on state officials in Cook County cause damage to the plaintiffs as voters, employees, or applicants in areas outside of Cook County. This failure flaws their claim. The fact that public officials in the Northern District of Illinois have entered into a consent decree which limits their discretion as public employers does not give rise to an equal protection claim merely because public officials in other parts of the state are not similarly restrained. The Equal Protection Clause of the Fourteenth Amendment protects individuals from state actions which purposefully discriminate against those who are entitled to be treated similarly. *McCalvin v. Fairman*, 603 F. Supp. 342 (C.D. Ill. 1985). Any disparate treatment which stems from orders

entered by a court disadvantages those parties who are restrained by the court order, not those left unaffected.

The plaintiffs allege in their memoranda but not in their complaint that friends of the state administration are treated differently that strangers in employment matters. If this argument is an attempt to bring the plaintiffs under the umbrella of the *Shakman* ruling, it fails. Such allegations do not show that the employers have singled out a particular group for disparate treatment and selected a course of action for the purpose of causing adverse political effects on an identifiable group.

Finally, the plaintiffs also concede that all but one of their claims under state law are barred by the Supreme Court decision in *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89 (1984). In *Pennhurst*, the Supreme Court held that the Eleventh Amendment bars a suit by a citizen against a state without a state's consent or Congressional abrogation of the state's immunity. "The state is the real, substantial party in interest" regardless of whether the suit seeks damages or injunctive relief. Applying that rule to the case at bar, there can be no doubt that the plaintiffs' suit is one against the State of Illinois. The plaintiffs have sued the state officials, including the Governor, in their official capacities. Moreover, the plaintiffs purport to sue two additional defendant classes, including the heads of all state departments, boards, and commissions under the jurisdiction of the Governor. The damage request if granted would be borne by the State under Ill. Rev. Stat. ch. 127, § 1302 (1983), and thus, clearly "would expend itself on the public treasury". *Pennhurst,* 465 U.S. at 101. Certainly the plaintiffs' request that a receivership be instituted to control and operate the hiring and promotion system of the State's fifty departments, boards, and commissions under jurisdiction of the Governor invades the province of the State.

The plaintiffs' argue that their state law claim seeking the restoration of funds expended to operate the Governor's office of personnel is not barred by the Eleventh Amendment because the plaintiffs are purportedly acting on behalf of the state. See Plaintiffs' Memorandum at 37. This court will not even address that argument because it is confident that all state claims must be dismissed if there no longer is a basis for federal jurisdiction. Since the court is constrained to dismiss all of the federal causes of action presented by the plaintiff, this remaining state claim must be dismissed as well. See *United Mineworkers v. Gibbs,* 383 U.S. 715, 726 (1966).

IT IS THEREFORE ORDERED that the defendants' motions to dismiss the plaintiffs' complaint is granted. The plaintiffs' complaint is dismissed with prejudice. The Clerk shall enter judgment accordingly.

ENTER this 11th day of July, 1986.

HAROLD A. BAKER
Chief U.S. District Judge